

1 UNITED STATES DISTRICT COURT
2
3 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

4 MICROSOFT CORPORATION,)
5 Plaintiff,) C10-1823-JLR
6 v.) SEATTLE, WASHINGTON
7 MOTOROLA INC., et al,) September 4, 2013
8 Defendant.) TRIAL
9

10 VERBATIM REPORT OF PROCEEDINGS
11 BEFORE THE HONORABLE JAMES L. ROBART
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

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15
16 For the Plaintiff: Arthur Harrigan, Christopher
17 Wion, David Pritikin Richard
Cederoth, Andy Culbert, Nathaniel
Love and Ellen Robbins
18

19
20 For the Defendants: Ralph Palumbo, William Price
21 Brian Cannon, Kathleen Sullivan
Andrea Roberts and Philip McCune
22

1 THE COURT: We will do appearances, please.

2 MR. HARRIGAN: Good morning, your Honor. Art
3 Harrigan representing Microsoft. To my right is Ms. Ellen
4 Robbins from the Sidley firm.

5 MS. ROBBINS: Good morning, your Honor.

6 MR. HARRIGAN: Mr. David Pritikin.

7 MR. PRITIKIN: Good morning, your Honor.

8 MR. HARRIGAN: Mr. Rick Cederoth.

9 MR. CEDEROOTH: Good morning, your Honor.

10 MR. HARRIGAN: Mr. Andy Culbert from Microsoft. My
11 partner Chris Wion.

12 MR. WION: Good morning, your Honor.

13 MR. HARRIGAN: And David Killough. And we also have
14 Mr. Gutierrez with us this morning.

15 THE COURT: Thank you. Mr. Palumbo.

16 MR. PALUMBO: Good morning, your Honor. Ralph
17 Palumbo. I have with me this morning Andrea Roberts from
18 Quinn Emanuel.

19 MS. ROBERTS: Good morning, your Honor.

20 MR. PALUMBO: Brian Cannon, also with Quinn Emanuel;
21 Kirk Dailey from Motorola, and Bill Price from Quinn Emanuel.

22 THE COURT: Thank you. Counsel, I have on my list of
23 things to do to rule on the request for judicial notice, and
24 then to begin the process of reading the jury instructions.
25 Ms. Sullivan, you are welcome to come forward. But,

1 Mr. Cannon, I understand you have another matter you want to
2 take up.

3 MR. CANNON: Thank you, your Honor. At the court's
4 convenience, we would like to take up the matter of
5 Microsoft's reliance on the FTC investigation in its closing
6 argument, and a couple of slides that lay out some
7 information about the FTC investigation. We can handle that
8 now or at the conclusion of what your Honor may wish to
9 address.

10 THE COURT: Let's get it out of the way.

11 MR. CANNON: May I approach, please?

12 THE COURT: Yes. I'm not sure whose forest of stands
13 we have over here, but since they obscure my view, can we
14 slide them back a ways until needed?

15 MR. CANNON: So, your Honor, as you may recall, at
16 the end of last week in this trial Microsoft convinced the
17 court to allow some limited testimony about the FTC
18 investigation, and the purpose of that testimony, according
19 to Microsoft, was to challenge Motorola's pure heart. It
20 went to Motorola's intent during the course of this case.

21 And what turned out to be when the evidence rested was
22 that Microsoft never asked any of the Motorola witnesses
23 about the investigation, they never used the FTC evidence
24 that your Honor allowed in in order to challenge the pure
25 heart of any of the witnesses, such as Mr. Dailey. And now

1 at closing, your Honor, it appears that Microsoft wants to
2 offer the FTC -- not offer, excuse me, rely upon the FTC
3 evidence for the proof of the matter alleged, and that is in
4 fact in direct contradiction, we believe, to your Honor's
5 order and your Honor's curative instruction during the course
6 of the case. And so we would request that the testimony on
7 FTC investigation be stricken, and that slides with
8 FTC-related evidence not be used.

9 THE COURT: I also seem to have a chronology here.
10 What's that about?

11 MR. CANNON: Yes, your Honor. The chronology is not
12 objectionable except for the references to the FTC
13 investigation. There is three references on there. So other
14 than the FTC references, Motorola does not have any objection
15 to that demonstrative being used in closing.

16 THE COURT: All right. I will hear from, it looks
17 like, Ms. Robbins.

18 MS. ROBBINS: Good morning, your Honor. The
19 slides -- there are two slides that we intend to use, which
20 are quotes from the record. Again, I believe the scope of
21 your Honor's ruling was that we were entitled to reference
22 certain portions, although the exhibits were not going to be
23 admitted. These are quotes from the record. The timeline
24 references various dates that came into the record through
25 witnesses. All of these dates are in the record. We are not

1 characterizing anything. We are not improperly going into
2 details of the investigation. The timeline merely references
3 dates of when certain things happened, and the chronology.
4 Again, there was testimony and evidence elicited during the
5 trial to support each of these dates.

6 For the other two slides: One, simply put -- the FTC's
7 public interest statement, that comes from Exhibit 1035 that
8 was testified to by Mr. Heiner. The other statement -- FTC
9 statement regarding its complaint also comes directly from
10 the testimony of Mr. Heiner.

11 THE COURT: To the extent that was -- Mr. Cannon,
12 where are you? There you are. Mr. Cannon, to the extent
13 that was an objection, as opposed to bringing this to the
14 court's attention, I am going to overrule the objection.
15 They are in the record. They came into the record with my
16 explanation that they were not going to the truth of those
17 matters; that they were being asserted to allow Microsoft to
18 argue that Motorola was on notice that its conduct was of
19 question. Therefore, I'm going to stay with my original
20 ruling and allow them.

21 MR. CANNON: Thank you, your Honor. Just to clarify
22 for our purposes, we also object to the underlying
23 FTC-related testimony, even if it is not on the slides. But
24 we understand your Honor's ruling.

25 THE COURT: You don't get to now object to something

1 that happened on August 30th. Is that what you're saying?

2 MR. CANNON: It is the testimony in the slides, but
3 it is the underlying testimony as well that we object to. I
4 am just clarifying the objection.

5 THE COURT: All right. Counsel, anything else? All
6 right.

7 I believe there is one other matter, and that is found in
8 the docket at 896, which is, "Defendants Request for Judicial
9 Notice," filed on Monday, September 2nd. In that request
10 Motorola asked the court to take judicial notice of 12 or 13
11 facts - I'm not sure how many there are. Thirteen - because
12 they are generally known and capable of accurate and ready
13 determination pursuant to the language of Evidence Rule 201,
14 judicial notice of adjudicated facts.

15 And then following that request, asks that the court
16 invoke Evidence Rule 201(f), which provides that, "In a civil
17 case, the court must instruct the jury to accept the noticed
18 fact as conclusive." The remainder of (f) pertains to what
19 happens in criminal cases.

20 The net effect of the proposal set forth by Motorola would
21 be to add to the court's jury instructions. The language
22 simply says, "In a civil case the court must instruct the
23 jury to accept the noticed fact as conclusive." I have
24 struggled in this case for a month or six weeks following
25 Motorola's expression of concerns over the use of the court's

1 findings and conclusions. In the course of that I have done
2 a substantial amount of research to determine how one could
3 use the findings and conclusions from the earlier trial. I
4 have set that out, and the parties have followed it, more or
5 less, during the course of this trial, not without some angst
6 on their parts. The only mechanism which would now be
7 available to the court would be as part of the jury
8 instructions, or before the jury instructions, announce these
9 13 facts as being established by the court, which seems to me
10 to substantially single them out; or, alternatively, include
11 them, in I believe it is Instruction 10, which is the
12 stipulated facts instruction -- or undisputed facts
13 instruction that the court is giving as part of its
14 instructions to the jury.

15 Therefore, I am going to deny the request for judicial
16 notice. And I do so on two grounds: One, 201(b) provides
17 the kinds of facts that may be judicially noticed. And there
18 are several of those that raise concern for me. I note that
19 many of these things are issues about which we have had
20 testimony at trial, and therefore to now ask the court to
21 take judicial notice of it and instruct the jury that it is
22 undisputed raises in my mind the question of why we wasted
23 trial time to have testimony about them. I would note, for
24 example, a question that has been asked repeatedly about does
25 Microsoft's complaint in this action include an express

1 statement that Microsoft seeks a license. And that is the
2 fact expressed in the negative. Microsoft's complaint in
3 this action does not include an express statement.

4 I think there are a number of difficulties with these.
5 Some are not facts that I feel comfortable taking judicial
6 notice of; some are simply not capable of judicial notice;
7 third, I believe that, given the presentation at this date,
8 would present those facts in a manner that would amplify
9 their significance to the jury; and, fourth, this was filed
10 well, well after the requests -- or the direction to file
11 your jury instructions; the pretrial order, none of which
12 mentioned this step; the court's informal jury conference in
13 which it allowed the parties to be heard, and were filed --
14 the request was filed on the evening before the day where
15 exceptions were being taken to the jury instructions. For
16 all of those reasons, I am denying the request to take
17 judicial notice of the facts that are contained in Docket
18 896.

19 Counsel, I believe with that ruling I have exhausted all
20 of the things you have asked me to do as homework.

21 Mr. Harrigan, is that correct?

22 MR. HARRIGAN: Yes. We just wanted to put on the
23 record that Microsoft's judgment as a matter of law brief was
24 filed at 8:50 this morning.

25 THE COURT: I'm not sure if it is Mr. Cannon,

1 Ms. Sullivan or Mr. Price.

2 MS. SULLIVAN: Your Honor, if it would be of
3 interest, Motorola's was filed at 8:54 this morning.

4 THE COURT: Counsel, I will note for you, one
5 additional fact is that we have all failed to notice that the
6 jury is now having theme day. Apparently yesterday was blue
7 day -- green day, and today is sport shirts day. You must be
8 very entertaining to them, because they seem to be having a
9 good time.

10 Any reason not to bring the jury in and have me read jury
11 instructions? Mr. Harrigan?

12 MR. HARRIGAN: No, your Honor.

13 THE COURT: Mr. Price?

14 MR. PRICE: No, your Honor.

15 THE COURT: Please bring the jury in.

16 (At this time the jury entered the courtroom.)

17 THE COURT: Good morning, ladies and gentlemen. We
18 are going to hand to you the court's jury instructions and
19 the court's verdict form. The original of the verdict form
20 will go back into the jury room with you, and so that you
21 won't have any confusion, it is stamped "original." That's
22 the one that you will fill out and return to the court once
23 you reach a verdict. In regards to the jury instructions, we
24 are giving each of you a copy so that you will have them
25 available during your deliberations.

1 As we talked about when I did the preliminary
2 instructions, I would ask that you follow along with me as I
3 read these. The research suggests that you somehow
4 accumulate more of the substance if you are reading along
5 with me as opposed to paging ahead to find out who did it in
6 the last instruction.

7 Before I commence reading all of these, let me tell you,
8 here is our schedule for the day: After I finish reading the
9 instructions, Microsoft will begin its closing argument.
10 They have the ability to reserve some of their time for
11 rebuttal. I believe that Mr. Harrigan is going to be doing
12 Microsoft's closing. Then, at the conclusion of that, I am
13 going to take a 15-minute break, so you will have a chance to
14 go back and stretch your legs and drink more coffee, use the
15 restroom, whatever. When we come back, Mr. Price is going to
16 be doing Motorola's closing arguments. I have given each
17 side up to 90 minutes. That doesn't mean they need to fully
18 use it, but that's how long they have. And at the end I will
19 start coughing loudly or whatever. We won't then take a
20 break, but will go directly into Microsoft's remaining time.
21 At the conclusion of all of that you will receive the case
22 for deliberation, which means you go back into the jury room.
23 But then you will finally be able to talk among yourselves,
24 which I'm sure will be a great relief.

25 Lunch will be brought in, so you don't get to go outside.

1 Deliberations normally run until 4:30, and at 4:30 I bring
2 you out, and guess what I read to you, because even though
3 you can now talk to your fellow jurors, you can't talk to
4 anyone else, and then send you on your way.

5 I am going to talk about scheduling for jury
6 deliberations. Nothing that I say suggests how long it
7 should take you. It is just a matter of I want you to know
8 what the court's schedule is and whatever. If you are
9 deliberating tomorrow, then you would start at 8:30 or 9:00,
10 your choice; you just can't begin until all of you are here.
11 We don't have you come into the courtroom and do a head count
12 or anything. The clerk does that. The lunch will be brought
13 in for you. I need to go to Spokane tomorrow in the
14 afternoon. The judges of the federal court and the justices
15 of the Washington Supreme Court get together, break bread and
16 make peace. We have a procedure whereby we can certify
17 questions to the state supreme court for decision. They run
18 for reelection, and they just love it when we send questions
19 like gay marriage down there to be decided. So annually we
20 get together and make up. You are going to be able to
21 continue to deliberate while I am not here. I will arrange
22 for there to be another judge. But if you send out
23 questions, there may well be some delay while they try and
24 get me on the phone and we try and figure it out. If you
25 reach a verdict, and if I'm not here, I am going to seal it,

1 and we will deal with it at 9:00 on Friday morning. Once
2 again, I am not going to tell you that you need to reach a
3 verdict in any particular timeframe, it is just that that is
4 the schedule.

5 I do that because I want to be able to review your verdict
6 and make sure that it is consistent internally before it is
7 read to the parties. And then afterwards I would like the
8 opportunity to meet with you and thank you personally for
9 your service.

10 That's the schedule for the remainder of the week, even
11 though it is early on Wednesday morning. That will give you
12 some sense. If at some point you want to modify that, you
13 decide you don't want to quit at 4:30, you want to go until
14 5:00, we can accommodate that. I do have a hard stop because
15 we need to send people home, including you. We are somewhat
16 limited in those hours.

17 With all that said, ladies and gentlemen, the instructions
18 of the court.

19 Number 1. Members of the jury, now that you have heard
20 all of the evidence and the arguments of the attorneys, it is
21 my duty to instruct you as to the law of the case. Each of
22 you has received a copy of these instructions that you may
23 take with you to the jury room to consult during your
24 deliberations. You must not infer from these instructions or
25 from anything I may say or do as indicating that I have an

1 opinion regarding the evidence or what your verdict should
2 be.

3 It is your duty to find the facts from all the evidence in
4 the case. To those facts you will apply the law as I give it
5 to you. You must follow the law as I give it to you, whether
6 you agree with it or not, And you must not be influenced by
7 any personal likes or dislikes, opinions, prejudices, or
8 sympathy. That means that you must decide the case solely on
9 the evidence before you. You will recall that you took an
10 oath to do so.

11 In following my instructions, you must follow all of them and
12 not single out some and ignore others; they are all
13 important.

14 When a party has the burden of proof on any claim by a
15 preponderance of the evidence, it means you must be persuaded
16 by the evidence that the claim is more probably true than not
17 true. You should base your decision on all of the evidence,
18 regardless of which party presented it.

19 What is evidence? The evidence you are to consider in
20 deciding what the facts are consists of: The sworn testimony
21 of any witness; the exhibits which are received into
22 evidence; and any facts to which the lawyers have agreed.

23 Number 4. What is not evidence? In reaching your
24 verdict, you may consider only the testimony and exhibits
25 received into evidence. Certain things are not evidence, and

1 you may not consider them in deciding what the facts are. I
2 will list them for you: Arguments and statements by lawyers
3 are not evidence. The lawyers are not witnesses. What they
4 have said in their opening statements, closing arguments, and
5 at other times is intended to help you interpret the
6 evidence, but it is not evidence. If the facts as you
7 remember them differ from the way the lawyers have stated
8 them, your memory of them controls.

9 Questions and objections by lawyers are not evidence.
10 Attorneys have a duty to their clients to object when they
11 believe a question is improper under the rules of evidence.
12 You should not be influenced by the objection or by the
13 court's ruling on it. Testimony that has been excluded or
14 stricken, or that you have been instructed to disregard, is
15 not evidence and must not be considered. In addition,
16 sometimes testimony and exhibits are received only for a
17 limited purpose; when I have given a limiting instruction,
18 you must follow it. Anything you may have seen or heard when
19 the court was not in session is not evidence. You are to
20 decide the case solely on the evidence received at the trial.

21 Number 5. Some evidence may be admitted for a limited
22 purpose only.

23 When I instructed you that an item of evidence has been
24 admitted for a limited purpose, you must consider it only for
25 that limited purpose and for no other.

1 Number 6. Evidence may be direct or circumstantial.
2 Direct evidence is direct proof of a fact, such as testimony
3 by a witness about what that witness personally saw or heard
4 or did. Circumstantial evidence is proof of one or more
5 facts from which you could find another fact. You should
6 consider both kinds of evidence. The law makes no
7 distinction between the weight to be given to either direct
8 or circumstantial evidence. It is for you to decide how much
9 weight to give to any evidence.

10 By way of example, if you wake up in the morning and see
11 that the sidewalk is wet, you may find from that fact that it
12 rained during the night. However, other evidence, such as a
13 turned-on garden hose, may provide a different explanation
14 for the presence of water on the sidewalk. Therefore, before
15 you decide that a fact has been proved by circumstantial
16 evidence, you must consider all the evidence in the light of
17 reason, experience, and common sense.

18 There are rules of evidence that control what can be
19 received into evidence. When a lawyer asks a question or
20 offers an exhibit into evidence, and a lawyer on the other
21 side thinks that it is not permitted by the rules of
22 evidence, that lawyer may object.

23 If I overruled the objection, the question was answered or
24 the exhibit received. If I sustained the objection, the
25 question was not answered or the exhibit was not received.

1 Whenever I sustained an objection to a question, you must
2 ignore the question and must not guess at what the answer
3 might have been.

4 Sometimes I ordered that evidence be stricken from the
5 record and that you disregard or ignore the evidence. That
6 means that when you are deciding the case, you must not
7 consider the evidence that I told you to disregard.

8 In deciding the facts in this case, you may have to decide
9 which testimony to believe and which testimony not to
10 believe. You may believe everything a witness says, or part
11 of it, or none of it. Proof of a fact does not necessarily
12 depend on the number of witnesses who testify about it.

13 In considering the testimony of any witness, you may take
14 into account: The opportunity and ability of the witness to
15 see or hear or know the things testified to; the witness's
16 memory; the witness's manner while testifying; the witness's
17 interest in the outcome of the case and any bias or
18 prejudice; whether other evidence contradicted the witness's
19 testimony; the reasonableness of the witness's testimony in
20 light of all the evidence; and any other factors that bear on
21 believability.

22 The weight of the evidence as to a fact does not
23 necessarily depend on the number of witnesses who testify
24 about it.

25 Number 9. Expert Opinion. Some witnesses, because of

1 education or experience, are permitted to state opinions and
2 the reasons for those opinions.

3 Opinion testimony should be judged just like any other
4 testimony. You may accept it or reject it, and give it as
5 much weight as you think it deserves, considering the
6 witness's education and experience, the reasons given for the
7 opinion, and all the other evidence in the case.

8 Number 10. Stipulations of Fact. The parties have agreed
9 to certain facts that will be read to you. You should
10 therefore treat these facts as having been proved. The
11 parties have stipulated to the following facts: Plaintiff
12 Microsoft Corporation ("Microsoft") is a Washington
13 corporation having its principal place of business in
14 Redmond, Washington. Defendant Motorola, Inc. has changed
15 its corporate name to Motorola Solutions, Inc. Motorola
16 Solutions, Inc. is a Delaware corporation, having its
17 principal place of business in Schaumburg, Illinois.
18 Motorola Mobility LLC is a Delaware limited liability
19 company, having its principal place of business in
20 Libertyville, Illinois. Motorola Mobility LLC
21 predecessor-in-interest was Defendant Motorola Mobility,
22 Inc., (MMI), which was a Delaware corporation having its
23 principal place of business in Libertyville, Illinois. MMI
24 was a wholly-owned subsidiary of Motorola Mobility Holdings,
25 Inc., which was a wholly-owned subsidiary of Motorola, Inc.

1 MMI was spun off from Motorola, Inc. on January 4, 2011. MMI
2 was acquired by Google, Inc. on May 22, 2012. Motorola
3 Mobility, LLC is MMI's successor-in-interest and a
4 wholly-owned subsidiary of Google, Inc.

5 Defendant General Instrument Corporation is a Delaware
6 corporation, having its principal place of business in
7 Horsham, Pennsylvania. General Instrument Corporation was a
8 wholly-owned subsidiary of MMI and now is a wholly-owned
9 subsidiary of Motorola Mobility, LLC.

10 Plaintiff Microsoft Corporation will be referred to in
11 these instructions as "Microsoft." Unless specifically
12 identified by its corporate identity, Defendants
13 Motorola, Inc., MMI, and General Instrument Corporation will
14 be referred to in these instructions collectively as
15 "Motorola."

16 The parties are members of the Institute of Electrical and
17 Electronics Engineers (IEEE). The Institute of Electrical
18 and Electronics Engineers Standards Association (IEEE-SA) is
19 the division of the IEEE devoted to the development of
20 industry standards. The IEEE-SA developed the 802.11
21 wireless communication standard. The 802.11 standard was
22 initially released in 1997. It has been amended and revised
23 numerous times since 1997, for example, 802.11a, 802.11b,
24 802.11g, and 802.11n).

25 The parties are members of the International

1 Telecommunications Union (sic) (ITU). The ITU
2 Telecommunications Standardization Sector (ITU-T) is one of
3 the three sectors (divisions or units) of the International
4 Telecommunications Union; it coordinates standards for
5 telecommunications. The ITU-T is responsible for the
6 development of thousands of standards. The ITU-T, in
7 conjunction with two other standards bodies, the
8 International Organization for Standardization (ISO) and the
9 International Electrotechnical Commission (IEC), developed
10 the H.264 video compression standard.

11 Motorola submitted numerous Letters of Assurance to the
12 IEEE-SA in connection with its development of the 802.11
13 standard. Motorola submitted numerous Patent Statement and
14 Licensing Declarations to the ITU-T in connection with the
15 development of the H.264 standard. In submitting Letters of
16 Assurance to the IEEE-SA covering their 802.11
17 standards-essential patents, Motorola stated that they "will
18 grant" or "are prepared to grant" worldwide, irrevocable,
19 non-exclusive licenses to their 802.11 standards-essential
20 patents covered by each Letter of Assurance on Reasonable and
21 Non-Discriminatory (RAND) terms and conditions.

22 Motorola sent Microsoft a letter on October 21, 2010, that
23 contained certain proposed royalty terms for a license to
24 Motorola's patents that "may be or become" essential to the
25 802.11 standard, and stated that, "Motorola will leave this

1 offer open for 20 days. Please confirm whether Microsoft
2 accepts the offer."

3 Motorola sent Microsoft a letter on October 29, 2010, that
4 contained certain proposed royalty terms for a license to
5 Motorola's patents essential to the H.264 standard, and
6 stated that, "Motorola will leave this offer open for 20
7 days. Please confirm whether Microsoft accepts the offer."

8 **Number 11. Summaries and charts not received in evidence.**
9 Certain charts and summaries not received in evidence have
10 been shown to you in order to help explain the contents of
11 books, records, documents, and other evidence in the case.
12 They are not themselves evidence or proof of any facts. If
13 they do not correctly reflect the facts or figures shown by
14 the evidence in the case, you should disregard these charts
15 and summaries and determine the facts from the underlying
16 evidence.

17 Certain charts and summaries have been received into
18 evidence to illustrate information brought out in the trial.
19 Charts and summaries are only as good as the underlying
20 evidence that supports them. You should, therefore, give
21 them only as much weight as you think the underlying evidence
22 deserves.

23 Number 13. A contract is a legally enforceable promise or
24 set of promises.

25 Number 14. Breach of contract. The following is a

1 summary of the claims of the parties provided to help you
2 understand the issues in the case. You are not to take this
3 instruction as proof of the matters claimed. It is for you
4 to decide, based upon the evidence presented, whether a claim
5 has been proved.

6 Microsoft claims that Motorola breached its contractual
7 commitment with the IEEE in one or more of the following
8 ways, or a combination thereof:

9 By the terms contained in the October 21, 2010, letter
10 offering to license Motorola's 802.11 standards-essential
11 patents; by filing lawsuits and seeking injunctive relief
12 based on standards-essential patents in the International
13 Trade Commission (ITC), United States District Courts, and/or
14 Germany; and/or by having not executed a license agreement
15 covering its 802.11 standards-essential patents with Marvell,
16 Microsoft's chip supplier.

17 Microsoft also claims that Motorola breached its
18 contractual commitment with the ITU in one or more of the
19 following ways, or a combination thereof: By the terms
20 contained in the October 29, 2010, letter offering to license
21 Motorola's H.264 standards-essential patents; by filing
22 lawsuits and seeking injunctive relief based on
23 standards-essential patents in the ITC, United States
24 District Courts, and/or Germany.

25 Microsoft also claims that it sustained damages as a

1 result of these breaches of Motorola's commitments to the
2 IEEE and ITU, and it seeks a judgment against Motorola for
3 these damages.

4 Motorola denies that any of its conduct breached its
5 contractual commitments with the IEEE and ITU.

6 Motorola further denies that Microsoft was damaged and
7 denies that any damages were the result of Motorola's
8 conduct. Motorola further denies the nature and extent of
9 the claimed damages.

10 Number 15. The plaintiff, Microsoft, has the burden of
11 proving each of the following four elements on its claims of
12 breach of contract with respect to the IEEE: (1), that
13 Motorola entered into a contract with the IEEE; (2), that the
14 terms of the contract included: that Motorola was required to
15 make available and grant a license to its 802.11
16 standards-essential patents to an unrestricted number of
17 applicants on a worldwide basis under reasonable rates, with
18 reasonable terms and conditions that are demonstrably free of
19 any unfair discrimination; (3), that Motorola breached the
20 contract in one or more of the ways claimed by Microsoft;
21 and, (4), that Microsoft was damaged as a result of
22 Motorola's breach.

23 I have already ruled that Motorola entered into an
24 enforceable contract with the IEEE that included the language
25 in subsection (2) above. The court has also already ruled

1 that Microsoft is a third-party beneficiary to this contract
2 because Microsoft is a member of the IEEE and is a
3 prospective user of the 802.11 Standard. As a third-party
4 beneficiary, Microsoft may enforce Motorola's contract with
5 the IEEE. You must follow these rulings, and therefore you
6 need not determine whether Microsoft proved the first two
7 elements of this claim. However, you must determine whether
8 Microsoft has proven each of the other two elements,
9 subsections (3) and (4) listed above. If you find from your
10 consideration of all of the evidence that either of these
11 other two elements listed above has not been proved, your
12 verdict should be for Motorola. On the other hand, if both
13 of these elements have been proved, your verdict should be
14 for Microsoft on its claim with respect to the IEEE.

15 Microsoft also has the burden of proving each of the
16 following elements on its claims of breach of contract with
17 respect to the ITU: That Motorola entered into a contract
18 with the ITU; the terms of the contract included: That
19 Motorola was required to grant a license for its H.264
20 standards-essential patents to an unrestricted number of
21 applicants on a worldwide, non-discriminatory basis and on
22 reasonable terms and conditions to make, use and sell
23 products compliant with the H.264 Standard. (3), that
24 Motorola breached the contract in one or more of the ways
25 claimed by Microsoft; (4) that Microsoft was damaged as a

1 result of Motorola's breach.

2 I have already ruled that Motorola entered into an
3 enforceable contract with the ITU that included the language
4 in subsection (2) above. The court has also already ruled
5 that Microsoft is a third-party beneficiary to this contract
6 because Microsoft is a member of the ITU and is a prospective
7 user of the H.264 Standard. As a third-party beneficiary,
8 Microsoft may enforce Motorola's contract with the ITU. You
9 must follow these rulings, and therefore, you need not
10 determine whether Microsoft proved the first two elements of
11 this claim as to Motorola. However, you must determine
12 whether Microsoft has proven each of the other two elements,
13 subsections (3) and (4) listed above. If you find from your
14 consideration of all of the evidence that either of these
15 other two elements listed above has not been proved, your
16 verdict should be for Motorola. If, on the other hand, if
17 both of these elements have been proved, then your verdict
18 should be for Microsoft on its claim with respect to the ITU.

19 Number 16. Duty of good faith and fair dealing is implied
20 in every contract. A contract is breached by violation of
21 this duty. The implied duty of good faith and fair dealing
22 arises out of the obligations created by a contract and only
23 exists in relation to the performance of specific contract
24 terms. Thus, a party's duty is only to perform, in good
25 faith, the obligations imposed by the contract. There is no

1 free-floating duty of good faith and fair dealing that
2 injects substantive terms into the parties' contract.

3 The following types of acts are examples of conduct that
4 in other cases have been found to violate the duty of good
5 faith and fair dealing: (1), evasion of the spirit of the
6 bargain; (2), willful rendering of imperfect performance;
7 (3), interference with or failure to cooperate in the other
8 party's performance; (4), abuse of discretion granted by the
9 contract; or (5), lack of diligence in performing the terms
10 of the contract. Each case, however, presents its own unique
11 circumstances, and you should view this list only as an
12 illustration of the kinds of conduct that can violate the
13 duty of good faith and fair dealing. You are not to use this
14 list as a complete catalogue of conduct that violates the
15 duty of good faith and fair dealing or as a standard under
16 which to assess the parties' conduct.

17 It is your job to determine whether Motorola breached its
18 duty of good faith and fair dealing in carrying out the terms
19 of the contracts at issue in this case. Good faith
20 performance of a contract requires being faithful to the
21 agreed common purpose of the contract and performing
22 consistently with the justified expectations of the other
23 parties. On the other hand, bad faith performance involves
24 conduct that violates community standards of decency,
25 fairness, or reasonableness.

1 In deciding whether Motorola breached its duty of good
2 faith and fair dealing, you may consider the following
3 factors, alone or in combination: (1), Whether Motorola's
4 actions were contrary to the reasonable and justified
5 expectations of other parties to the contract; (2), whether
6 Motorola's conduct would frustrate the purpose of the
7 contract; (3), whether Motorola's conduct was commercially
8 reasonable; (4), whether and to what extent Motorola's
9 conduct conformed with ordinary custom or practice in the
10 industry; (5) to the extent the contract vested Motorola with
11 discretion in deciding how to act, whether Motorola exercised
12 that discretion reasonably; (6), subjective factors, such as
13 Motorola's intent and whether Motorola had a bad motive.

14 If you consider subjective factors, such as Motorola's
15 intent or motive, you must be aware that this is only one
16 consideration and it need not dictate your final decision.
17 Bad motive or intent does not necessarily imply bad faith,
18 and good motive or intent does not necessarily imply good
19 faith. Likewise, bad motive or intent is not a prerequisite
20 to bad faith, nor is good motive or intent a prerequisite to
21 good faith.

22 Number 17. As explained above in Instruction Number 15,
23 element (2), Motorola's contract with the IEEE required
24 Motorola to grant Microsoft a license to Motorola's 802.11
25 standards-essential patents on a worldwide basis under

1 reasonable rates, with reasonable terms and conditions
2 demonstrably free of any unfair discrimination. Likewise,
3 Motorola's contract with the ITU required Motorola to grant
4 Microsoft a license to Motorola's H.264 standards-essential
5 patents on a worldwide, non-discriminatory basis and on
6 reasonable terms and conditions. For short, the parties have
7 referred to these requirements as Motorola's reasonable and
8 non-discriminatory RAND commitments.

9 Although Motorola is required to grant a RAND license, the
10 specific terms of the license are left to the parties.
11 Nevertheless, in connection with its RAND obligations,
12 Motorola must comply with its duty of good faith and fair
13 dealing, described above in Instruction Number 16. If you
14 find that Motorola violated its duty of good faith and fair
15 dealing in connection with its RAND obligations with respect
16 to its contracts with either the IEEE or the ITU, then you
17 must find that Microsoft has proved Element (3) in
18 Instruction Number 15 for that contract.

19 Number 18. Purpose of the RAND commitment. As set forth
20 in Instruction Number 16, one factor to consider in
21 determining if Motorola breached its duty of good faith and
22 fair dealing is whether Motorola's conduct frustrated the
23 purpose of the contract. The purposes of the RAND commitment
24 are: To encourage widespread adoption of the standard; to
25 prevent patent "hold-up," which is the ability of a

1 standards-essential patent owner to demand more than the
2 value of its patented technology; to prevent royalty
3 stacking, which is the payment of excessive royalties to many
4 different standards-essential patent owners; and to induce
5 the creation of valuable standards by ensuring that owners of
6 valuable patents will receive reasonable royalties for their
7 patents.

8 Number 19. Offers to license standards-essential patents.
9 In this case, Microsoft claims that Motorola's October 21
10 offer letter and/or Motorola's October 29 offer letter
11 breached Motorola's duty of good faith and fair dealing. In
12 assessing this claim, you should rely on the good faith and
13 fair dealing standard set forth in Instruction Number 16.
14 Further, in the context of offering to license
15 standards-essential patents subject to a RAND commitment,
16 there are additional legal principles that you should be
17 aware of:

18 (1), Initial offers in a RAND licensing negotiation do not
19 need to be on RAND terms; any offer by Motorola, be it an
20 initial offer or an offer during a back-and-forth
21 negotiation, must comport with the duty of good faith and
22 fair dealing set forth in Instruction Number 16; in
23 determining whether Motorola's October 21 offer letter and/or
24 Motorola's October 29 offer letter complied with Motorola's
25 duty of good faith and fair dealing, you may compare

1 Motorola's offers against the RAND royalty rate and range
2 determined by the court and set forth in Instruction
3 Number 20.

4 However, the size of an offer alone is not exclusively
5 dispositive of whether Motorola has breached its duty of good
6 faith and fair dealing. To determine whether Motorola's
7 offer breached its duty of good faith and fair dealing, you
8 must use the standard set forth in Instruction Number 16.

9 Instruction Number 20. As I stated at the beginning of
10 the trial, this case has been conducted in two phases, and
11 this is the second phase. In the first phase, I conducted a
12 bench trial, the purpose of which was to determine a RAND
13 royalty rate and range for Motorola's standards-essential
14 patents. As I told you before, the IEEE and ITU do not set
15 RAND rates at which parties are required to license their
16 standards-essential patents. Instead, determinations of RAND
17 rates are left to the parties.

18 Here, the parties never agreed on a RAND rate to license
19 Motorola's standards-essential patents. However, in order
20 for you to properly assess Microsoft's breach of contract
21 claim, you must know what a RAND royalty rate and range would
22 be for Motorola's standards-essential patents.

23 I will now tell you again what those rates are. For each
24 group of standards-essential patents, I have found both a
25 RAND rate and a RAND range. This reflects the fact that more

1 than one licensing rate could be RAND. The RAND ranges are
2 defined by an upper bound and a lower bound. To determine
3 the RAND rate and range, I assumed that Microsoft and
4 Motorola engaged in negotiations and found the rate and range
5 that the parties would have agreed to through such
6 negotiations.

7 I found that a RAND royalty rate for Motorola's H.264
8 standards-essential patent portfolio is 0.555 cents per unit,
9 with the upper bound of a RAND royalty for Motorola's H.264
10 standards-essential patent portfolio being 16.389 cents per
11 unit, and the lower bound being 0.555 cents per unit. This
12 rate and range is applicable to both Microsoft Windows and
13 Xbox products. For all other Microsoft products using the
14 H.264 Standard, the royalty rate is the lower bound of 0.555
15 cents per unit.

16 I also concluded in that previous bench trial that the
17 RAND royalty rate for Motorola's 802.11 standards-essential
18 patent portfolio is 3.471 cents per unit, with the upper
19 bound being 19.5 cents per unit and the lower bound being 0.8
20 cents per unit. This rate and range is applicable to
21 Microsoft Xbox products. For all other Microsoft products
22 using the 802.11 Standard, the royalty rate is the lower
23 bound of 0.8 cents per unit.

24 In the bench trial, I did not decide whether Motorola
25 breached its contracts with the IEEE and ITU. That is for

1 you to decide, and you alone. Throughout this trial, you may
2 have heard lawyers refer to the bench trial and to the
3 findings of fact and conclusions of law that I made in that
4 trial. You must follow the legal rulings I made in that
5 trial and accept the facts that I found as related to you in
6 these instructions and during the course of the trial, but
7 you are not to take any reference to the previous trial as
8 deciding the breach of contract issues in this case or as
9 implying for which side your verdict should be rendered. In
10 the prior trial, I did not examine whether Motorola breached
11 its contractual commitments with the IEEE and ITU by
12 violating the covenant of good faith and fair dealing that is
13 implied in those contracts. I have not made a decision on
14 those issues. It is for you, and you alone, to determine
15 whether Motorola breached its contractual commitments based
16 on the evidence you have heard in this trial.

17 Instruction 21. Microsoft claims that Motorola's actions
18 in seeking injunctive relief in the ITC, United States
19 District Courts, and/or in Germany, violated Motorola's duty
20 of good faith and fair dealing. In assessing this claim, you
21 should again rely on the good faith and fair dealing standard
22 set forth in Instruction Number 16. Further, in the context
23 of seeking injunctive relief for standards-essential patents
24 subject to a RAND commitment, there are additional legal
25 principles that you should be aware of:

1 (1), The RAND commitment does not by itself bar
2 standards-essential patent owners from ever, in any
3 circumstances, seeking injunctive relief to enforce their
4 patents.

5 (2), However, in some circumstances, it may be a breach of
6 the duty of good faith and fair dealing for a
7 standards-essential patentholder to seek injunctive relief
8 against a standards-essential patent implementer. To
9 determine whether Motorola's actions in seeking injunctive
10 relief violated Motorola's duty of good faith and fair
11 dealing, you must use the standard set forth in Instruction
12 Number 16.

13 Microsoft did not repudiate or forfeit any of its rights
14 under the contracts by seeking the Court's assistance through
15 the present lawsuit against Motorola. Microsoft had neither
16 a duty to first apply for a license from Motorola nor a duty
17 to negotiate with Motorola before Motorola's RAND licensing
18 obligations were triggered.

19 Number 23. It is the duty of the court to instruct you as
20 to the measure of damages.

21 By instructing you on damages the court does not mean to
22 suggest for which party your verdict should be rendered.

23 In order to recover actual damages, Microsoft has the
24 burden of proving that Motorola breached a contract with the
25 IEEE or the ITU, and that Microsoft incurred actual economic

1 damages as a result of the breach, and the amount of those
2 damages.

3 If your verdict is for Microsoft on Microsoft's IEEE
4 breach of contract claim, and if you find that Microsoft has
5 proved that it incurred actual damages and the amount of
6 those actual damages, then you shall award actual damages to
7 Microsoft.

8 Similarly, if your verdict is for Microsoft on Microsoft's
9 ITU breach of contract claim, and if you find that Microsoft
10 has proved that it incurred actual damages and the amount of
11 those actual damages, then you shall award actual damages to
12 Microsoft.

13 Actual damages are those losses that were reasonably
14 foreseeable, at the time the contract was made, as a probable
15 result of a breach. A loss may be foreseeable as a probable
16 result of a breach because it follows from the breach either:

17 (A) in the ordinary course of events, or;
18 (B) as a result of special circumstances, beyond the
19 ordinary course of events, that the party in breach had
20 reason to know.

21 In calculating Microsoft's actual damages on its IEEE
22 contract claim, you should determine the sum of money that
23 will put Microsoft in as good a position as it would have
24 been in had Motorola performed all of its promises under the
25 IEEE contract.

1 In calculating Microsoft's actual damages on its ITU
2 contract claim, you should determine the amount of money that
3 will put Microsoft in as good a position as it would have
4 been in had Motorola performed all of its promises under the
5 ITU contract.

6 The burden of proving damages rests with Microsoft, and it
7 is for you to determine, based upon the evidence, whether any
8 particular element has been proved by a preponderance of the
9 evidence. You must be governed by your own judgment, by the
10 evidence in the case, and by these instructions, rather than
11 by speculation, guess, or conjecture.

12 Number 24. With regard to Microsoft's breach of contract
13 claims, in your determination of damages you are to use the
14 following measure of damages, in the amounts proved by
15 Microsoft: (a), the costs that Microsoft incurred for
16 relocating Microsoft's distribution centers to the
17 Netherlands in Spring 2012 to avoid the consequences of the
18 injunctive relief sought by MMI and General Instrument
19 Corporation in Germany; and (b), the costs that Microsoft
20 incurred in defending against lawsuits filed by Motorola
21 seeking injunctive relief against Microsoft in District
22 Courts within the United States, before the ITU, (sic) and in
23 German courts. I believe that is supposed to be ITC. 24,
24 Line 11. We picked up our typo.

25 Ladies and gentlemen, if we counted up the number of

1 lawyers and the years of education we have here, it would be
2 staggering, but apparently we are not very good proofreaders.
3 So in Instruction Number 24, in Line 11, where it says
4 "before the ITU," it should say before the ITC, and German
5 courts.

6 Regarding part (b), you may only award such damages, if
7 you find that Motorola's lawsuits seeking injunctive relief,
8 apart from Motorola's general course of conduct, violated
9 Motorola's duty of good faith and fair dealing. In
10 determining whether Motorola's lawsuits seeking injunctive
11 relief violated the duty of good faith and fair dealing, you
12 shall consider the circumstances surrounding each lawsuit.
13 Each lawsuit seeking injunctive relief shall be considered
14 individually.

15 Keep in mind that there are two contracts at issue in this
16 case, the ITU contract and the IEEE contract. If you find
17 that only one of the contracts has been breached, you must
18 determine the amount of damages caused by that breach and
19 award only that amount.

20 Number 25. The law that applies to this case authorizes
21 an award of nominal damages. If you find that Motorola
22 breached its contract with either the ITU or the IEEE, and
23 that Microsoft was harmed as a result, but you find that
24 Microsoft has failed to prove damages as defined in these
25 instructions, you must award nominal damages. Nominal

1 damages must be greater than zero and may not exceed \$1.00.

2 Number 26. A plaintiff who sustains damage as a result of
3 a defendant's breach of contract has a duty to minimize its
4 loss.

5 Microsoft is not entitled to recover for any part of the
6 loss that it could have avoided with reasonable efforts.

7 Motorola has the burden to prove Microsoft's failure to use
8 reasonable efforts to minimize its loss and the amount of
9 damages that could have been minimized or avoided.

10 27. Under the law, a corporation is considered to be a
11 person. It can only act through its employees, agents,
12 directors, or officers. Therefore, a corporation is
13 responsible for the acts of its employees, agents, directors,
14 and officers performed within the scope of authority.

15 28. When you begin your deliberations, you must elect one
16 member of the jury as your presiding juror. That person will
17 preside over the deliberations and speak for you here in
18 court.

19 You will then discuss the case with your fellow jurors to
20 reach agreement, if you can do so. Your verdict must be
21 unanimous.

22 Each of you must decide the case for yourself, but you
23 should do so only after you have considered all of the
24 evidence, discussed it fully with the other jurors, and
25 listened to the views of your fellow jurors.

1 Do not hesitate to change your opinion if the discussion
2 persuades you that you should.

3 Do not come to a decision simply because other jurors
4 think it is right.

5 It is important that you attempt to reach a unanimous
6 verdict but, of course, only if each of you can do so after
7 having made your own conscientious decision. Do not change
8 an honest belief about the weight and effect of the evidence
9 simply to reach a verdict.

10 Some of you have taken notes during the trial. Whether or
11 not you took notes, you should rely on your own memory of
12 what was said. Notes are only to assist your memory. You
13 should not be overly influenced by the notes.

14 30. Conduct of the jury. I will now say a few words
15 about your conduct as jurors.

16 First, because you must decide this case based only on the
17 evidence received in the case and on my instructions as to
18 the law that applies, you must not be exposed to any other
19 information about the case or to the issues it involves
20 during the course of your jury duty. Except for discussing
21 the case with your fellow jurors during your deliberations:

22 Do not communicate with anyone in any way and do not let
23 anyone else communicate with you in any way about the merits
24 of the case or anything to do with it. This includes
25 discussing the case in person, in writing, by phone or

1 electronic means, via e-mail, text messaging, or any Internet
2 chat room, blog, Web site or other feature. This applies to
3 communicating with your fellow jurors until I give you the
4 case for deliberation, and it applies to communicating with
5 everyone else, including your family members, your employer,
6 and the people involved in the trial, although you may notify
7 your family and your employer that you have been seated as a
8 juror in the case. But, if you are asked or approached in
9 any way about your jury service or anything about this case,
10 you must respond that you have been ordered not to discuss
11 the matter and to report the contact to the court.

12 Because you will receive all the evidence and legal
13 instruction you properly may consider to return a verdict, do
14 not read, watch, or listen to any news or media accounts or
15 commentary about the case or anything to do with it; do not
16 do any research, such as consulting dictionaries, searching
17 the Internet or using other reference materials; and do not
18 make any investigation or in any other way try to learn about
19 the case on your own.

20 Second, during the trial, do not talk with or speak to any
21 of the parties, lawyers, or witnesses in this case - when it
22 says "during the trial," that includes you deliberations -
23 not even to pass the time of day. It is important not only
24 that you do justice in this case, but also that you act
25 accordingly. If a person from one side of the lawsuit sees

1 you talking to a person from the other side, even if it is
2 just about the weather, that might raise a suspicion about
3 your fairness. So, when the lawyers, parties or witnesses do
4 not speak to you in the halls, on the elevator or the like,
5 you must understand that they are not being rude. They know
6 they are not supposed to talk to you while the trial is going
7 on, and they are just following the rules.

8 The law requires these restrictions to ensure the parties
9 have a fair trial based on the same evidence that each party
10 has had an opportunity to address. A juror who violates
11 these restrictions jeopardizes the fairness of these
12 proceedings, and a mistrial could result that would require
13 the entire trial process to start over. If any juror is
14 exposed to any outside information, please notify the court
15 immediately.

16 If it becomes necessary during your deliberations to
17 communicate with me, you may send a note through the
18 courtroom deputy, signed by your presiding juror or by one or
19 more members of the jury. No member of the jury should ever
20 attempt to communicate with me except by a signed writing. I
21 will communicate with any member of the jury on anything
22 concerning the case only in writing, or here in open court.
23 If you send out a question, I will consult with the parties
24 before answering it, which may take some time. You may
25 continue your deliberations while waiting for the answer to

1 any question. Remember, you are not to tell anyone,
2 including me, how the jury stands, numerically or otherwise,
3 until after you have reached a unanimous verdict or have been
4 discharged. Do not disclose any vote count in any note to
5 the court.

6 And, finally, Number 32. Return of verdict. A verdict
7 form has been prepared for you. After you have reached
8 unanimous agreement on a verdict, your presiding juror will
9 fill in the form that has been given to you, sign and date
10 it, and advise the court that you are ready to return to the
11 courtroom.

12 Ladies and gentlemen, also attached to the material we
13 gave is a copy of the form that you are free to use when you
14 are back in the jury room. It is only the original that will
15 be signed and returned, but this is for to you to help keep
16 track of your decisions.

17 At this time I would ask you to give your attention to
18 Microsoft, which is going to present its closing argument.
19 Mr. Harrigan.

20 MR. HARRIGAN: Thank you, your Honor. Your Honor,
21 would it be okay if I started while the easels are being set
22 up?

23 THE COURT: Yes.

24 MR. HARRIGAN: I would like to start by thanking all
25 of you by taking a chunk of a pretty nice Seattle summer to

1 help us resolve this important case.

2 It is an important case, and the importance stems from the
3 importance of the RAND commitment to the entire standards
4 system. As you heard many times in the last week or so, the
5 RAND commitment is a fundamental element in the success of
6 standards, and standards are an emblem of the achievement
7 that can be reached by human cooperation and ingenuity. But
8 it requires cooperation, and it requires cooperation with
9 respect to the willingness of companies using the standard to
10 adopt it and put it into their products, which in turn
11 depends upon being able to do so at a reasonable cost.

12 In Phase I of this case, as you know, the court reached
13 what is actually a landmark decision in determining RAND for
14 these Motorola's standards-essential patents, and in
15 enforcing the RAND contract. In the course of that, the
16 court decided that true value of Motorola's WiFi and H.264
17 patents.

18 And it is not disputed in this case that Motorola's
19 patents in those two standards were, in fact, a mere sliver
20 of the total technology in the two standards, which is
21 important to bear in mind in evaluating Motorola's conduct.
22 These slivers have a lot of power when they are misused. It
23 is a very small part of the standard, but because of the
24 nature of the standards system, a sliver of a standard can be
25 as powerful as the whole standard, because if you withhold

1 your sliver you prevent the adopting party from using the
2 standard. It is all one piece, and it has to interoperate,
3 so a sliver is a very powerful weapon. If you can't use the
4 sliver, you can't use the standard.

5 Now, this case began when Motorola demanded what I hope
6 will persuade you was the hold-up value of its
7 standards-essential patents in these two standards. When
8 Microsoft got those letters, and we will go into this in more
9 detail, it immediately recognized what was happening.
10 Motorola was using standards-essential patents, which are
11 very powerful, but they are only powerful if you don't obey
12 the RAND commitment.

13 So Microsoft noted that these letters were addressing only
14 standards-essential patents, and were seeking what were
15 obviously outrageous royalties. So what Microsoft did was it
16 came to this court and asked the court to enforce the RAND
17 obligation, asked the court to determine what the RAND
18 royalty was, and asked the court to do an accounting of what
19 Microsoft owed to Motorola for the use of its share of these
20 two standards once the court had determined what the RAND
21 rate was.

22 Once Microsoft filed this action and asked the court to do
23 those things, Motorola knew that it could get everything it
24 was ever entitled to for its slice of these two standards
25 right here in this court. All it had to do was present its

1 view on what the royalty should be, the court would decide
2 what the royalty should be, what the royalty was, what the
3 RAND rate was, and Motorola would be paid exactly what it was
4 entitled to, and that's all it is entitled to.

5 But that isn't what Motorola wanted, as its conduct
6 demonstrates. Because what Motorola did was it immediately
7 turned around and filed actions for injunctive relief based
8 on these very same standards-essential patents that this
9 court was dealing with here.

10 Now, with the court's ruling, it is now beyond dispute
11 that Motorola's demands in its October letters exceeded the
12 actual RAND royalty by a vast amount, and it certainly far
13 exceeded the true value of its small part of each of these
14 standards. However, this enormous disparity between their
15 demands and RAND was also self-evident at the time of the
16 letters. It was evident to Microsoft and it was also evident
17 to Motorola, which is a matter which I will discuss shortly.

18 Now, why did Motorola make these demands? They were
19 basically sham offers. Their purpose was to pave the way for
20 the next step, which was to seek injunctive relief against
21 Microsoft's most valuable products, as a lever in the other
22 larger negotiation. Motorola was using the
23 standards-essential patents because of their unique power to
24 gain leverage in the larger patent portfolio negotiations
25 between the parties, but it could only do that by demanding

1 much more than RAND; because if Motorola had in fact made a
2 RAND offer, Microsoft could simply have accepted it, paid the
3 modest royalty and we wouldn't be here.

4 The purpose of the demands was so that Motorola could say
5 that it had offered a license. It could claim, just as the
6 letters themselves claim, that it had offered a license on
7 RAND terms. But then on day 21 when the offer expired,
8 because no -- Microsoft couldn't conceivably accept it,
9 Motorola could go to court and say we offered a license,
10 Microsoft didn't take it, therefore they don't have a license
11 to use our standards-essential patents, they are infringing
12 them, and we want injunctive relief against Microsoft's
13 products that embody these patents.

14 But Motorola had no right to injunctive relief at that
15 time, because Motorola had not complied with its contract.
16 It had not made these patents available to Microsoft on RAND
17 terms, on reasonable terms. And there isn't really any
18 dispute about that, because this court has decided what RAND
19 was, and Motorola's demand was vastly more than that. It
20 doesn't make any sense that you can go into court and
21 complain that someone is using your patents without a license
22 when you have an obligation to offer them for a reasonable
23 amount, and, instead, you offer them only for an utterly
24 unreasonable amount, and then use that offer as a basis for
25 seeking injunctive relief.

1 Now, the standards-setting organizations required Motorola
2 to commit to RAND before they accepted its technology into
3 the standard. And Motorola made those commitments, as you
4 know, and then years later when the standards were widely
5 adopted and widely used and embedded in many products,
6 Motorola turned and did not honor that commitment.

7 Motorola's conduct here actually became a threat to the
8 standards system if it had been allowed to go unchecked. I
9 would like to remind you of what Mr. Horacio Gutierrez,
10 Microsoft's corporate vice-president and deputy general
11 counsel, said here in court about the reason Microsoft
12 brought this case.

13 He was asked if there was anything besides money that
14 Microsoft was asking for in this case. He said, "Actually
15 there is a broader principle at stake here." I am not going
16 to read this whole thing to you. But basically what he is
17 saying is, if people can breach their contract obligation
18 with standards organizations then it would really make it
19 impossible for companies to be able to rely on those RAND
20 promises, and would put companies in the position where they
21 would be reluctant to implement those standards. So the
22 point here is, that Microsoft's effort to enforce this
23 contract is a key step in assuring that the next company that
24 thinks about this will not do it. And if that were
25 otherwise, this would threaten the whole basis of the

1 standards system.

2 Now, the RAND promise that Motorola made is a pretty
3 straightforward statement. I would like to put up those
4 promises for you. The first one is the H.264 promise. It
5 says basically what Motorola committed to was that it would
6 grant a license for its H.264 standards-essential patents to
7 an unrestricted number of applicants on a worldwide
8 non-discriminatory basis and on reasonable terms and
9 conditions.

10 The next one is the WiFi commitment. And it is
11 essentially the same. However, there is a difference with
12 respect to the WiFi commitment to the IEEE, because in
13 addition to the requirement to offer on reasonable terms,
14 that term is more precisely stated, where, if you look at the
15 bottom, Motorola agreed that it would make its
16 standards-essential patents available at nominal competitive
17 cost. So it would be important to compare the WiFi actions
18 by Motorola to that requirement, that they be made available
19 at nominal competitive cost.

20 Now, what was wrong with Motorola's injunction actions
21 under this contract? There is at this point not a flat
22 prohibition against seeking injunctions related to
23 standards-essential patents. But, first, the patentholder
24 has to meet its obligations. It has to make the
25 standards-essential patents available on reasonable terms

1 before it can -- and then the person, the company to whom it
2 is making this proposal, has to turn it down. In other
3 words, the proposal has to comply with the contract
4 obligation to offer on reasonable terms. And then if the
5 company that has been made an offer on RAND terms turns it
6 down, an action for injunctive relief may be appropriate.
7 But it makes no sense to say that Motorola could make a
8 demand that is vastly higher, and in breach of its contract,
9 and then use the fact that Microsoft doesn't have a license
10 as a basis for injunctive relief.

11 And we know that, in fact, Motorola's letters were not
12 offers on RAND terms, because the court has decided what that
13 is, and they are enormously higher -- they call for
14 enormously higher royalties. And, in fact, to this day
15 Motorola has never made a RAND offer for the
16 standards-essential patents at issue here.

17 So after making these excessive demands, and after the
18 deadline of 20 days expired, Motorola launched an injunction
19 blitz, with a German injunction action as the centerpiece.
20 The German action was filed in July 2011. And I think you
21 heard some testimony yesterday about how long it takes to get
22 to trial and get an injunction, but the fact is that is not
23 true in Germany. In Germany, with the filing in July, an
24 injunction was imminent seven months later. Injunctions are
25 routine in Germany, and they are fast. And defenses that are

1 available to a company that is using a patent in the United
2 States are not available in Germany. In fact, Professor
3 Haedicke testified that the German legal system does not even
4 recognize RAND. So going to Germany is a good strategy if
5 you want to use standards-essential patents as a leverage.

6 This hold-up campaign came very close to succeeding. It
7 failed for two reasons: One, timely intervention by this
8 court. Just as the injunction in Germany was about to issue,
9 Microsoft had asked the court to block Motorola from
10 enforcing it so that this court could proceed to decide what
11 the contract required, and give Motorola the royalty that it
12 was entitled to. Actually, Motorola did get an injunction in
13 Germany. But what happened is this court, before Motorola
14 could actually enforce it, ordered Motorola not to enforce
15 it, so that this case could proceed, and the contract could
16 be upheld, and Motorola would receive everything it was
17 entitled to.

18 Secondly, the order that the court entered was a temporary
19 order. Even when it was extended, Motorola appealed that
20 order to the Ninth Circuit. So there was still uncertainty
21 hanging over whether Motorola would be prohibited from
22 enforcing the injunction. At the same time, Microsoft, in
23 order to protect itself, proceeded with an alternative
24 approach, which was to move its distribution center out of
25 Germany so that any injunction that was entered would not

1 stop its distribution process. And it did so with enormous
2 haste, as you heard the testimony the other day of
3 Mr. Davidson, and considerable expense. But this was the
4 insurance, assuming it could be accomplished in time, against
5 having the devastating effect of a German injunction.

6 Now, Motorola says it has wanted to arrive at RAND terms,
7 but that is actually clearly not true. Microsoft filed this
8 action in November of 2010. Motorola could have gotten a
9 RAND license right here. And that is powerful evidence of
10 why it actually filed these actions for injunctive relief.
11 Since it could have gotten whatever -- everything it was
12 entitled to here, it didn't need injunctions to get it. It
13 filed for injunctive relief in order to gain leverage in the
14 broader negotiations.

15 Now, the second phase of the case is where we are today.
16 In this phase, Microsoft is seeking another point ruling by
17 this jury, which is that parties who are subjected to hold-up
18 for standards-essential patents and who resist by opposing
19 the injunctions, or, in this case also by moving out of
20 harm's way, can recover the costs of doing so.

21 Not every company that gets into a situation like this has
22 the financial resources that Microsoft has, and it is
23 important to the integrity of the standards system for a
24 company that faces this to know that if it stands up for its
25 rights it can recover the costs of doing so at the end of the

1 day.

2 Now, I would like to turn to some of the significant facts
3 established during the trial. First of all,
4 standards-essential patents are a world apart from other
5 patents. They are subject to the RAND commitment, because of
6 the fact that they are very powerful instruments. The reason
7 is, Microsoft and hundreds of other companies rely on the
8 standards, and they incorporate the standards into their
9 products, and they wouldn't dare to do so if it were not for
10 the RAND commitment.

11 David Treadwell, who was Microsoft's corporate
12 vice-president for the Xbox software, explained this. He
13 said, "There has been quite a bit of discussion" -- The
14 question was, "There has been quite a bit of discussion were
15 RAND commitments so far. What role, if any, do RAND
16 commitments in relation to an industry standard play in the
17 Xbox decision as to whether to include that industry standard
18 in the Xbox?" He said, "The existence of RAND commitments
19 are a foundational part of our decision to include standards
20 in the Xbox. We need to know that we can depend upon them in
21 including that technology for the benefit of our customers at
22 reasonable price to us."

23 Jon Devaan, for Windows, testified to essentially the same
24 effect.

25 Now, contrast standards-essential patents with regular

1 patents. You can't make an appealing product without
2 including many of these standards, including H.264 and WiFi.
3 On the other hand, with respect to regular patents, the
4 situation is totally different. Frequently you can take
5 whatever feature of your product is potentially infringing a
6 regular patent and you can design around the patent, you can
7 drop the feature, even if you are being subjected to an
8 excessively high royalty demand.

9 But with standards-essential patents, the owner of even a
10 sliver of each standard has everyone over a barrel. You
11 can't take the sliver out, because then you are not in
12 compliance with the standard. So the ways that people deal
13 with regular patent infringement cases simply don't work with
14 respect to standards. For WiFi to work, it has to mesh with
15 everybody else that is using WiFi. If you remove any part of
16 it, you no longer comply with the standards. So the owner of
17 a sliver has the power of the whole standard.

18 Now, Motorola has suggested that Microsoft started this
19 argument, that it was trying to put Motorola out of business
20 with respect to its Android phones, and that Microsoft was
21 simply -- and that Motorola was simply responding in kind and
22 putting its patents on the table. But that isn't what
23 actually happened. And the argument doesn't make sense.
24 RAND is a contract obligation. There is no exception to that
25 obligation just because you are annoyed at somebody for

1 filing an infringement action on normal every day patents.
2 Motorola's reason for -- or motivation for doing what it did
3 is not an exception to the RAND obligation.

4 So here is what actually did happen. I should remind you
5 that Mr. Leonard agrees with this when he was asked
6 yesterday, "Now, Microsoft's October 1 lawsuit did not excuse
7 or release Motorola from its H.264 and 802.11 RAND
8 commitments, did it?" And he basically says, "I would say
9 probably not."

10 So the action that Microsoft filed on October 1st with
11 respect to Motorola's infringement of Android -- of
12 Microsoft's regular patents in its Android phones was not a
13 standards-essential patent action, and it was not, as
14 Motorola contends, an out-of-business scenario for Motorola.
15 First of all, Motorola could have removed the feature that
16 Microsoft was suggesting was infringed. Second, it could
17 have designed around Microsoft's patents. It could have
18 accomplished the same thing in a different way. Or, third,
19 it could have paid a reasonable royalty. There is no
20 contention in this case that the royalty that Microsoft was
21 seeking in connection with the Android phone patent
22 infringement was anything but reasonable. And in fact, the
23 evidence here is that most of the other companies who are
24 producing Android phones have signed license agreements with
25 Microsoft, and they are not paying excessive royalties. So

1 there was a simple solution -- there was one or more simple
2 solutions for Motorola to that problem.

3 And here is what Mr. Gutierrez said about that Android
4 phone situation. He testified that, "Microsoft has invested,
5 over decades, billions of dollars every year in developing
6 technologies for operating systems." And then he goes on to
7 say that -- down here, "About 80 percent of all the Android
8 smartphones that are sold in the U.S. come licensed to
9 Microsoft's full portfolio of 70,000 patents. So the vast
10 majority of the Android devices in the U.S. market are
11 covered by a Microsoft license." And he says, "The notable
12 exception to this is Motorola."

13 So there was nothing devastating about the situation
14 Motorola faced with regard to its Android phones. All it had
15 to do was either design around the problem or pay a
16 reasonable royalty. No one is contending that Microsoft was
17 asking for the kind of royalties for the Android patents
18 that Motorola was asking for for its standards-essential
19 patents.

20 Now, what would have been the logical way for Motorola to
21 deal with this? You recall that Mr. Dailey testified that he
22 had been researching for months regarding Motorola's patents
23 in anticipation of a global negotiation with Microsoft with
24 respect to their portfolio and Microsoft's portfolio. If you
25 wanted to start a normal negotiation in that situation you

1 would put on the table those patents, the ones that he had
2 been researching. But what did he, in fact, do? Motorola,
3 in fact, put its standards-essential patents in the two
4 standards on the table in the form of the two letters. The
5 only reason to do this is to gain leverage; and the only way
6 to gain leverage is to demand more than the RAND rate for the
7 patents. Because if you make the offer on RAND rate, there
8 is no leverage, Microsoft simply pays the modest royalty and
9 the issue is over.

10 There is another big difference between the action by
11 Motorola with respect to its standards-essential patents and
12 Microsoft's action regarding its Android phone patents; and
13 that is, that Motorola was in fact threatening Microsoft's
14 basic business. The three injunction actions would have
15 stopped all Windows and Xbox sales in a large part of the
16 globe. That had nothing in common with the situation
17 Motorola was dealing with with respect to Android.

18 So I think it would be a good time to look at what the
19 instructions say about the obligations of Motorola.

20 JUROR: I can't see this at all. Are they the same
21 as what are printed in our pages? And, if so, if
22 Mr. Herrington could refer to the pages, we can follow along
23 with our pages.

24 THE COURT: I can't see it at all either.

25 JUROR: If you could refer to the pages, please, so

1 we can follow along.

2 MR. HARRIGAN: Since the instructions are numbered, I
3 will simply give you the number and tell you what the
4 significance is of certain parts.

5 So Number 16 defines the duty of good faith and fair
6 dealing. And Microsoft is contending in this case that
7 Motorola breached its duty of good faith and fair dealing.
8 And it gives you the factors to consider, alone or in
9 combination, in deciding whether Motorola did breach.

10 First, is whether Motorola's actions --

11 THE COURT: Mr. Harrigan, let me stop you for a
12 second. Ladies and gentlemen, when Mr. Harrigan is facing
13 the boards, can you hear him?

14 You are going to need to project towards the jury. They
15 can't hear you when you are facing that way.

16 MR. HARRIGAN: Yes. I am going to call your
17 attention to Item Number 2 in these factors, and talk about
18 that for a minute. Item Number 2 is, "Whether Motorola's
19 conduct would frustrate the purpose of the contract. So a
20 key factor in whether there has been a breach of the covenant
21 of good faith and fair dealing is whether Motorola's conduct
22 would frustrate the purpose of the contract. That leads us
23 to Instruction Number 18, which describes what the purpose of
24 the RAND commitment are. And here, I am going to call your
25 attention to the purpose in that instruction, which is

1 described as "To prevent patent hold-up, which is the ability
2 of the standards-essential patent owner to demand more than
3 the value of its patented technology." That's up on your
4 screen now.

5 So we know that a purpose -- a key factor in whether the
6 duty of good faith and fair dealing has been breached is
7 whether the conduct would frustrate a purpose of the
8 contract. And we know from Instruction Number 18 that a
9 purpose of this contract is to prevent patent hold-up, which
10 is the ability of a standards-essential patent owner to
11 demand more than the value of its patented technology. That
12 is what happened here. And it is not disputable, because we
13 know that Motorola demanded literally thousands of times the
14 amount of royalties that this court, in ruling on the RAND
15 contract, determined was actually the RAND royalty.

16 Now, there is also an instruction that addresses offers.
17 Instruction 19, which is over here for anybody that can read
18 it, has two important provisions. One is, "Initial offers in
19 a RAND licensing negotiation do not need to be on RAND
20 terms." But, "Secondly, any offer by Motorola, whether it is
21 an initial offer or an offer during a back-and-forth
22 negotiation must comport with the duty of good faith and fair
23 dealing," as set forth in Instruction 16.

24 So these have to be read together. First, "Opening offers
25 do not have to be RAND, but every offer has to comply with

1 the duty of good faith and fair dealing." Why is it not a
2 breach if the opening offer is higher than RAND? Well, it
3 may not be bad faith. For example, if the royalty is a
4 penny, and the offer is 1.1 cents, maybe the holder of the
5 standards-essential patents just missed it by a little bit,
6 and there is no reason why that would be indicating bad
7 faith. But in this case we have -- This situation does not
8 resemble that at all. Here, the opening offer was vastly
9 above RAND. And that's where the second part of this
10 instruction comes in, which is, every offer, including the
11 October 21 -- including the October 2010 demands by Motorola
12 must comply with the duty of good faith and fair dealing.

13 So the question for you is whether Motorola, in demanding
14 enormously higher royalties than this court determined to be
15 RAND, was breaching the duty of good faith. And the fact
16 that the demands were literally thousands of times what RAND
17 actually was is very compelling evidence that they were not
18 good faith offers.

19 Secondly, the fact that these offers were so high was not
20 an accident. Motorola knew what the RAND range was for its
21 patents. It had actually had a study done in 2003 to
22 determine what the value of its WiFi patents -- its portion
23 of the WiFi standard was.

24 In 2003 Motorola's consultant recommended an effective
25 royalty of one tenth of a percent of the price of products

1 containing WiFi for Motorola's patents. We now know that
2 they actually overestimated Motorola's contribution to the
3 WiFi standard, because it didn't realize, as this court has
4 determined -- excuse me, it didn't realize what is undisputed
5 in this case, which is that Motorola's share of 802.11 was a
6 sliver. The InteCap rates are actually 25 times higher than
7 they should be. But what they are saying here is the
8 reasonable royalty was a tenth of a percent of the price, and
9 what Motorola asked for or demanded in October was
10 2.25 percent of the price. So it was not difficult for
11 Motorola to determine that what it was demanding was
12 outrageous.

13 Motorola had other information about what a reasonable
14 royalty was. It was directly involved in the MPEG LA
15 discussions. Do you recall Mr. Garrett Glanz testifying
16 about that? And that related to the H.264 standard. In
17 those MPEG LA meetings Motorola argued for lower royalties
18 than were then under discussion. And it actually succeeded
19 in getting the royalties that were ultimately adopted
20 reduced. The discussions started at 20¢ per unit, with no
21 caps. And Motorola said that that rate would be too high for
22 mobile phones, because it would discourage adoption. In
23 fact, basically Mr. Bawel, Motorola's representative, said
24 that they would go looking for another way to do video
25 compression if the rate were as high as 20¢ per unit. In

1 Motorola's demand letters they are asking for 2.25 percent of
2 the laptop price for each operating system, which is \$11.25 a
3 unit for a \$500 laptop. So Motorola had plenty of
4 information from its own experience with MPEG LA to realize
5 that the demands in the letters were outrageous.

6 Motorola also knew that the effect of what it was asking
7 for would be a royalty just for H.264 of \$4 billion a year,
8 when this court's RAND royalty would result in a total
9 royalty per year of \$2 million. We know that Motorola did
10 perform these estimates, so it did know that what it was
11 asking for for H.264 was in the range of \$4 billion.

12 And Mr. Dailey testified: "When you put together the two
13 letters that we looked at, did you understand how much
14 Motorola stood to gain in royalty revenue if Microsoft
15 accepted the terms as set forth in the letters?" Answer:
16 "We had some calculations around in line with that somewhere,
17 yes." And, of course, it is very easy to figure this out,
18 because the sales of laptops are publicly available, and
19 Motorola could compute that \$4 billion number as easily as
20 anybody else.

21 Look at it this way: Did Motorola really think that its
22 H.264 slice -- its slice of H.264 was really worth that much
23 money? There is no evidence of Motorola licensing its H.264
24 patents ever before. And if they are really worth
25 \$4 billion, you would think somebody would be working pretty

1 hard to get some licenses. So it is clear that Motorola's
2 corporate knowledge on this was that they knew they were
3 making offers that were far above RAND, and that knowledge is
4 compelling evidence of bad faith because their obligation was
5 to make their patents available on reasonable terms.

6 Now, there are a couple of other things about the letters
7 that tell us that Motorola was acting in bad faith. Let's
8 put up the letter. This is the H.264 letter. First of all,
9 this letter doesn't say, here is a proposal, let's talk about
10 how to get to a RAND royalty. The letter says, "Motorola
11 offers to license the patents on a non-discriminatory basis
12 on reasonable terms and conditions, RAND." In other words,
13 Motorola is saying, this is RAND. It is not saying, RAND is
14 something else, make us a counteroffer and we will negotiate
15 down to something sensible. It is saying, this is our RAND
16 offer.

17 The other thing about -- Another element here that is
18 important is, this was not just a momentary lapse, because
19 Motorola continued to demand 2.25 percent for both standards
20 through 2012.

21 Mr. Gutierrez testified about this. "Did you have a
22 further conversation with Mr. Dailey in December of 2012,
23 after the trial?" That is the trial in this case that set
24 the RAND rate. But, of course, it hadn't happened yet,
25 because the rate was set in April after the trial. "Yes."

1 "And in that conversation did Mr. Dailey tell you what the
2 royalty rate was that they wanted for their H.264 and 802.11
3 at that time? And what did he tell you?" "It was
4 2.25 percent." So after all of the information was developed
5 for the November trial, the following month, Mr. Dailey's
6 position was we still we want 2.25 percent.

7 And, remember the video of Mr. Taylor, Motorola's
8 corporate vice-president in charge of IP and IP counsel? He
9 was asked about what he thought about a royalty of a tenth of
10 a percent. That's the same royalty percentage that the
11 InteCap study came up with. Specifically, he was asked, "Why
12 did you think when the Exhibit 1 letter was sent that 2.25
13 was a reasonable rate as distinct, for example, from a tenth
14 of a percent?" And he said, "A tenth of a one percent would
15 never have entered my mind that. Would be a ludicrous rate.
16 It wouldn't justify the transaction cost and licensing, much
17 less provide any compensation for our R&D investment. I
18 never considered a rate like that in my years at Motorola."

19 As we have already discussed, that tenth of a percent is
20 -- the actual demand by Motorola in the letters was 22 and a
21 half times that amount. Obviously 2.25 percent is a lot more
22 than a tenth of a percent. And Motorola was -- this
23 gentleman says Motorola would never even consider anything as
24 low as a tenth of a percent. Yet, what the court determined
25 actual RAND was, is a half a cent for H.264. And what

1 Motorola was demanding is, in the case of a \$500 laptop, is
2 \$11.25.

3 Mr. Dailey also says that he rushed these letters out and
4 just threw in the normal 2.25 percent. That is not the case.
5 Motorola carefully tailored this letter to be unacceptable.

6 Let's put up the letter again. There is an aspect of this
7 letter that raises the royalty enormously, and it is clear.
8 And that is that the royalty is applied to each PC laptop,
9 each smart phone, et cetera. It is not applied to component
10 software, which is Microsoft's operating system.

11 What happens because of that is that the royalty doubles
12 when the operating system is in a thousand dollar laptop
13 versus a \$500 laptop. There is absolutely nothing different
14 about the role of H.264 in the operating system or the laptop
15 that varies with the price of the laptop. So the entire
16 amount of the difference between 11.25 and 22.50, which is
17 the difference in the royalty under those two situations, is
18 the hold-up value. That is, even if Motorola's patents were
19 worth 11.25, they are not worth another 11.25 when they are
20 included in a laptop that has more memory or a fancier case.

21 And Mr. Dailey testified that he had made a conscious and
22 deliberate decision to ask Microsoft to pay a royalty based
23 on the sales revenues of its downstream customers. He says,
24 "That was the initial offer, yes." In fact, this approach of
25 charging a percentage royalty on the downstream customers'

1 products was never done before by Motorola. This letter was
2 custom tailored for Microsoft, and it was designed to be
3 unacceptable.

4 So what happened when the letters arrived at Microsoft?
5 Microsoft immediately realized what was actually going on
6 here. The reason for that is not simply that the demands
7 were stunningly high, but that Motorola was using
8 standards-essential patents as weapons in this negotiation.
9 They were using standards-essential patents for their
10 leverage. Remember, Mr. Dailey said he had been going
11 through the portfolio of Motorola looking for regular patents
12 to use in negotiations with Microsoft. And yet, when this
13 letter was sent a short time after Microsoft sued on the
14 Android phones, what Motorola used in the letter were
15 standards-essential patents, not the ones that Mr. Dailey had
16 been researching.

17 Mr. Dailey knew that he could not use standards-essential
18 patents as leverage. He testified in response to this
19 question: "You can't use your standards-essential patents to
20 try to force someone to take a license on more favorable
21 terms on patents that are nonessential to the same standard?
22 You wouldn't do that, would you?" "I'm not so sure what you
23 mean by that. I don't think so."

24 What did Microsoft do when these letters came in? It
25 decided to immediately ask for the help of this court in

1 enforcing Motorola's RAND obligations. This lawsuit assured
2 that Motorola would get everything it was entitled to.

3 On November 9 Microsoft sued seeking a RAND determination
4 and an accounting of what Microsoft owed for a license. Here
5 is what Microsoft asked for: "A judicial accounting of what
6 constitutes a royalty rate in all aren't consistent with
7 Motorola's promises for WLAN" -- this is WiFi patents,
8 "identified as essential by Motorola and for H.264 patents
9 identified by Motorola."

10 So this lawsuit asked the court to do an accounting of
11 what Microsoft owed Motorola for a license after -- once the
12 court determined what the RAND royalty was. That means from
13 this point forward Motorola could get everything it was ever
14 entitled to by simply proceeding through this case. Instead,
15 the day after Microsoft filed this action, Motorola sued for
16 injunctive relief on its standards-essential patents. It
17 filed a Wisconsin action to block all sales of Xbox and
18 Windows in the United States.

19 Later, in November, it compounded this action by filing in
20 the ITC seeking to block the importation of Xbox. ITC
21 proceedings are very speedy and trial proceedings were set
22 for January 2012.

23 In this same timeframe, November and December,
24 Mr. Gutierrez and Mr. Dailey had some further discussions.
25 And in those discussions -- I think we've got this,

1 Mr. Gutierrez said that Mr. Dailey took the position that --
2 in their discussions about the patent portfolio negotiations,
3 "They were telling us that they didn't want to license those
4 patents to us. So they were consistently putting an
5 exclusion in the scope, saying that Microsoft would not get a
6 license for its Windows products on H.264 and 802.11."

7 So, far from wanting to negotiate on those patents,
8 Mr. Dailey was taking them off the table because he wanted to
9 hold them back and use the leverage of seeking injunctions
10 based upon those patents as part of the overall negotiation
11 regarding the portfolio.

12 And this was actually a continuation of a pattern that
13 started at the MPEG LA meetings that Mr. Eric Glanz talked
14 about. And I will just briefly remind you, after
15 participating in the entire process of putting together a
16 reasonable royalty for H.264, when the time came to put the
17 signature on the agreement among all the pool participants,
18 Motorola suddenly decided not to join. What it was doing
19 was, it was holding the same standards-essential patents
20 back, so that it wouldn't be bound by the pool rates, which
21 were at that point ten cents a unit, and instead could turn
22 around and ask for \$11.25 for the same patents if they were
23 installed in a \$500 laptop. So taking these
24 standards-essential patents off the table and using them for
25 leverage was standard operating procedure.

1 So here was the situation in the winter of 2011 to 2012.
2 First of all, there was the potential of early injunctions in
3 two cases. Germany, at this point it was anticipated there
4 could be an injunction by the end of March of 2012. In the
5 ITC an injunction would potentially issue later that year.
6 The German threat of an injunction was potentially
7 devastating. As you already heard, that distribution center
8 handles distribution of all of Microsoft's packaged products,
9 Xbox and Windows, to a large part of the globe. An
10 injunction would stop all of that distribution in a flash.

11 Bear in mind, that Motorola was pursuing this German
12 action and the ITC even though it could get everything it was
13 entitled to right here, and this case was pending, and the
14 trial was set for November of 2012. So you have to ask
15 yourself, why was Motorola seeking injunctions when all it
16 was entitled to is a reasonable royalty, and it was going to
17 get that right here?

18 So what happened? Well, you recall Professor Murphy's
19 analogy of the holdup in the park. First, give me your
20 money. Second, pull out the gun. First, give me your money
21 were the demands in November; pull out the gun was filing for
22 injunctive relief. And sometimes what happens is a policeman
23 comes along, and in this case the policeman was the Seattle
24 court.

25 First, the Seattle court said, we will decide RAND, and

1 there will be a license at a RAND royalty. But, second, as
2 this German injunction loomed toward the end of March,
3 Microsoft came to the court and said, please order Motorola
4 not to enforce it, because if they can enforce it they will
5 inflict such damage on Microsoft's business that we will be
6 forced to enter into a licensing agreement on unreasonable
7 terms, and cut off what this court is in the process of
8 doing. And, fortunately, this court did enter that order,
9 and ordered Motorola not to enforce the injunction that it
10 had just gotten in Germany.

11 Microsoft had to do something else also, because it was
12 not certain that the court would take this action. And even
13 when it was taken, it was temporary. And even after it
14 became permanent, Motorola appealed that to the Ninth
15 Circuit. So to be safe, and because there was considerable
16 uncertainty about even -- about whether the injunction would
17 endure, Microsoft decided to move its distribution center out
18 of Germany to the Netherlands, where the jurisdiction of the
19 German court does not extend. And as a result, before any
20 injunction could impact its business, Microsoft was operating
21 in the Netherlands at a cost of about \$23 million.

22 Another thing happened in 2012 that effects the issue of
23 Motorola's good faith here; and that is that the FTC took an
24 interest in the situation. Microsoft told the FTC what was
25 going on, and the FTC took some action, which I am going to

1 remind you of here. First of all, it filed this statement
2 with the International Trade Commission where Motorola was
3 seeking the Xbox exclusion order. The FTC said, "Simply put,
4 we are concerned that a patentee can make a RAND commitment
5 as part of a standard-setting process, and then seek an
6 exclusion order for infringement of the RAND encumbered
7 standards-essential patent as a way of securing royalties
8 that may be inconsistent with the RAND commitments.

9 So the FTC is saying that their concern that there can be
10 a RAND commitment, a promise to license on reasonable terms,
11 that is entered into during the standard-setting process, and
12 then after the standard is successful and it is embedded on
13 all kinds of products, turn around and seek an exclusion
14 order, which is an injunction, stopping the products from
15 being distributed or in this case imported as a way of
16 securing royalties that may be inconsistent with the RAND
17 commitments. In other words, exactly what Motorola was
18 doing.

19 And Motorola knew this. It knew it in June of 2012. And
20 yet, it was still trying to get -- it was appealing the
21 German -- the order by this court stopping the German
22 injunction, and it was still pursuing its ITC exclusion
23 order, even knowing about this position on the part of the
24 FTC.

25 The FTC did something else a little earlier in May

1 of 2012; it opened an investigation into Motorola's conduct.
2 And in the complaint regarding that, the FTC said that,
3 "Before its acquisition by Google, Motorola reneged on a
4 licensing commitment made to several standard-setting bodies
5 to license its standards-essential patents relating to
6 smartphones, tablet computers and video game systems on FRAND
7 terms by seeking injunctions against willing licensees of
8 those standards-essential patents." What that means is, for
9 willing licensees you can read Microsoft, because Microsoft
10 was standing by ready to take a license at whatever rate this
11 court decided was RAND. So it was a willing licensee. And
12 the FTC was concerned that Motorola had reneged on its RAND
13 commitment by seeking injunctions against willing licensees,
14 those who were ready to enter into a contract on reasonable
15 terms.

16 So in looking at whether Motorola was in bad faith, you
17 need to consider the fact that all through the second half of
18 2012 it knew what the FTC thought about what it was doing,
19 and it continued seeking an exclusion order in the ITC until
20 January of 2013 when it finally dropped that request in the
21 same timeframe as it entered into a consent decree with the
22 FTC.

23 To deal with the German situation, Microsoft took some
24 other steps. First of all, it actually was held up in
25 Germany. You will recall the discussion about the

1 Orange-Book offer. Well, Microsoft used that Orange-Book
2 procedure. It offered to pay Motorola about three U.S.
3 pennies for a license to its two German H.264 patents. Not
4 to all of its patents, not to all of its H.264 patents, but
5 the two in Germany. 3¢. This court decided that RAND was a
6 half a cent. So Microsoft put on the table six times the
7 amount that the court determined was RAND, and Motorola
8 turned it down. So Microsoft was held up, it just wasn't
9 held up enough for Motorola.

10 If that offer had been accepted, Microsoft would not --
11 that 3¢ offer for something that was only worth a half a
12 cent, Microsoft would not have had to move the warehouse.
13 When I say it is 3¢ versus a half cent, it really wasn't,
14 because it was only for two patents out of Motorola's H.264
15 patents. It was the entire portfolio that this court said
16 was worth a half a cent.

17 Second, Microsoft moved its warehouse to escape the
18 potential German injunction. As you heard from Mr. Davidson,
19 this was a massive crash program, and the fact that Microsoft
20 was willing to spend \$23 million to do that shows that it was
21 very worried about the impact of this German situation. And,
22 of course, it came to this court asking for relief in the
23 form of an order to Motorola not to enforce the injunction.

24 Now let's take a quick look at the instructions to see how
25 Motorola's conduct fits into the definition of the breach of

1 the covenant of good faith and fair dealing. The opening
2 paragraph of Instruction 16 identifies the factors that you
3 can consider in determining whether Motorola's actions were a
4 breach of the duty of good faith.

5 And we have already -- The first one is, "Whether they
6 were contrary to the reasonable and justified expectations of
7 other parties to the contract." Well, the justified
8 expectations of other parties to this contract were that they
9 would get -- they would be able to get a license on RAND
10 terms, and would not have to face injunctions as long as they
11 were willing to pay that reasonable amount. That is not what
12 happened here. Microsoft put a more than reasonable amount
13 on the table in Germany. Microsoft committed in writing to
14 accept a license from this court on whatever the court
15 decided was a RAND rate. So it had no -- Microsoft had a
16 reasonable expectation that having done that it shouldn't
17 need to worry about injunctions. But Motorola was proceeding
18 with them anyway, contrary to the reasonable and justified
19 expectations of the other party.

20 And then the second factor is whether Motorola's conduct
21 would frustrate a purpose of the contract. And we have
22 already talked about this. The second item identified as the
23 purpose of the contract is to prevent hold-up, which is
24 defined as, "the ability of a standards-essential patent
25 owner to demand more than the value of its patented

1 technology." Well, we now know that is exactly what Motorola
2 was doing. So it was frustrating that purpose of the
3 contract.

4 Then the third one is whether Motorola's conduct was
5 commercially reasonable. Remember, Motorola knew all about
6 the MPEG LA royalty discussions. Twenty of the most
7 experienced companies in this field got together and came up
8 with what they thought was a fair royalty. The amount they
9 came up with was a tiny fraction of what Motorola was
10 demanding. So its demands, and the injunctions that were
11 predicated on Microsoft's not accepting those demands, were
12 not commercially reasonable.

13 The fourth factor is whether and to what extent Motorola's
14 conduct conformed with the ordinary custom and practice in
15 the industry. Well, we know what the ordinary custom and
16 practice in the industry is. It is to make your
17 standards-essential patents available at a reasonable
18 royalty. That is the exact opposite of what Motorola was
19 doing.

20 The other element of the reasonable custom and practice in
21 the industry is that you don't go seeking injunctions against
22 standards-essential patents unless you have made a RAND offer
23 and the other party has turned it down. If the other party
24 is a willing licensee, as Microsoft was, coming into this
25 court and saying, please set the RAND royalty and we will pay

1 it, there is no basis for seeking injunctive relief. The
2 only reason to seek injunctive relief is to use it as an
3 improper leverage device in the larger negotiation about the
4 two patent portfolios.

5 And then the fifth one is, to the extent the contract
6 vested Motorola with discretion in deciding how to act,
7 whether Motorola exercised that discretion reasonably. Well,
8 Motorola had the discretion to ask for a royalty. It could
9 have exercised that discretion, let's say, by asking for a
10 little bit more than RAND, and nobody would have a complaint.
11 But what Motorola did was it asked for literally a thousand
12 or two thousand times RAND for H.264, and similarly for the
13 802.11, that was the technology embodied in Xbox. It had
14 discretion, but it did not exercise that discretion
15 reasonably. It used it as a lever. It used it for the power
16 of withholding the standards-essential patents.

17 And, finally, subjective factors, such as Motorola's
18 intent and whether Motorola had a bad motive. Well, I have
19 already discussed the fact that Motorola was well aware of
20 what industry rates were, what the specific rates were for
21 the pool, for H.264, and its own InteCap study on 802.11
22 showed that the rates were vastly lower than what it was
23 demanding.

24 THE COURT: Mr. Harrigan, you have now used 60
25 minutes of your time.

1 MR. HARRIGAN: Thank you, your Honor.

2 Now, another purpose of the RAND commitment is the third
3 one on this list, which is to prevent royalty stacking. And
4 this can be disposed of rather quickly. Royalty stacking is
5 what occurs if a -- if a royalty demand is made, that if
6 everybody asked for a proportionate amount would make the
7 technology too expensive for anyone to incorporate into their
8 products.

9 And it is pretty simple arithmetic. Motorola asked for
10 2.25 percent on H.264 and it asked for 2.25 percent on
11 802.11. There were 92 other companies with
12 standards-essential patents in the 802.11 standard. That
13 means if they all did what Motorola did, the royalty, just
14 for H.264, would be over 200 percent over the price of the
15 product. It would kill the standard. That is royalty
16 stacking. That was a key purpose of the RAND commitment.
17 And Motorola clearly violated it.

18 The similar arithmetic applies to the H.264 patents, where
19 there were 52 companies involved in the standard. Obviously,
20 that arithmetic is still over 100 percent. It makes no
21 sense. It is absurd. You can't pay more than you are
22 getting for your product just to get one part of one
23 standard -- get a license for one part of one standard.

24 Now, there is another chapter to this story, which I will
25 go through briefly. Motorola got a request from Marvell for

1 a license to Motorola's part of the WiFi standard. And
2 Marvell went to Motorola for a license because Microsoft
3 asked it to.

4 Motorola's response to Marvell was, we want 2.25 percent,
5 not of the value of your chip that you sell for \$3 that
6 contains the WiFi function, but 2.25 percent of the product
7 price of any product in which that chip is included.

8 So if you just look at -- Say that the customer was
9 Microsoft. Marvell sells this \$3 chip to Microsoft, it gets
10 \$3, that chip contains the WiFi function; not just Motorola's
11 part of the WiFi function, but the whole thing. And yet, the
12 royalty on that, based on this proposal by Motorola, would be
13 2.25 percent of a \$500 laptop, \$11.25. That's what Motorola
14 was telling Marvell it needed to pay for a license to a tiny
15 part of what is embodied in the chip that sells for \$3.

16 So if you want to talk about stacking, it only took one
17 request by Motorola to stack Marvell out of business. You
18 don't need to take into account the other 91 companies that
19 were part of that same standard. So Motorola's conduct
20 toward Marvell was obviously -- was basically a statement, we
21 do not have any interest in licensing this technology on a
22 basis that would undercut our position with Microsoft where
23 we are trying to use it as leverage. So they made exactly
24 the same proposal to Marvell that they were insisting upon
25 for Microsoft, and for exactly the same reason, so that they

1 could continue to seek injunctive relief without making a
2 RAND offer.

3 Now, it may be useful to put up some statements that we
4 heard from Dr. Leonard yesterday in the context of these
5 events we just reviewed. He was asked this question
6 yesterday. This is Motorola's economics expert. "With
7 respect to the letters that were sent in October of 2010,
8 what is your reaction to the testimony that the letters might
9 have provided leverage?" He said, "Again, the letter by
10 itself is just a piece of paper. It can't provide any
11 leverage. The only way -- And Motorola can't just say,
12 Microsoft, you have to pay us, and then Microsoft has to do
13 it. What would have to happen is Motorola would ultimately
14 have to go to court, or, of course, they would have to reach
15 an agreement."

16 So he says, "These demand letters in October are just a
17 piece of paper." Well, so is a ransom note. A ransom note
18 is just a piece of paper unless you have a hostage. And
19 here, at the time of those letters sent in October of 2010,
20 Motorola had a hostage. It was holding its
21 standards-essential patents hostage, and it was sending
22 Microsoft a ransom note.

23 Dr. Leonard made another statement yesterday, and
24 Microsoft agrees with this one. I just want to call your
25 attention to these parts. "In a case where it is a

1 standards-essential patent, and the patent owner has agreed
2 that they are willing to exchange use of their patent rights
3 for money, then certainly money would seem to be a very
4 appropriate way to compensate the patent owner for any injury
5 that occurred without an injunction. So from an economic
6 point of view, you don't really need an injunction, you just
7 award a money amount of damages." This is a description of
8 exactly what this case was going to accomplish. From
9 November of 2010 on Motorola could have gotten everything it
10 was entitled to, as Dr. Leonard says, a money amount of
11 damages right here, and you don't need an injunction.

12 So why was Motorola pursuing injunctions? It was doing it
13 to put fear into Microsoft that its most valuable products
14 would be enjoined from being distributed or sold in a large
15 part of the globe, and to use the leverage of that
16 injunction, which Dr. Leonard says they don't need, in order
17 to get concessions in other areas in the larger patent
18 portfolio negotiations.

19 I am going to wrap up here by simply reminding you of the
20 amounts of damages Microsoft is seeking here. If we could
21 have the two slides on that. These are the costs that
22 Microsoft incurred in moving the distribution center from
23 Germany to the Netherlands, a total of \$23.7 million. The
24 11.6 is just the cost of actually doing the move and setting
25 up the new facility. The \$12 million is the difference in

1 the operating costs at the Netherlands facility compared to
2 the German facility. That's part one of the damages claim.

3 Part two is attorneys fees. And they have been segregated
4 into three components in case you should decide that Motorola
5 breached one standard but not the other -- one RAND
6 commitment but not the other. So we have an amount for
7 H.264. And this is for work that was done by the lawyers
8 that related to injunctions affecting H.264. So, for
9 example, that would be most of the German expense, because
10 that is the standard that was involved there. And then the
11 second category is work on opposing injunctions on WiFi or
12 802.11. And then the total.

13 And then the third category is work that was done that
14 can't really be divided between the two. It dealt with both.
15 So the total amount is just under \$6 million. Thank you for
16 your attention.

17 THE COURT: Ladies and gentlemen, Microsoft has some
18 remaining time, which they are permitted to use in rebuttal,
19 but we are going to take our break now. We will give you
20 your full 15 minutes. We will come back out at 11:25. And
21 then Mr. Price is going to give you the closing argument on
22 behalf of Motorola. And I have limited that also to 90
23 minutes. Use your time wisely back there, and we will see
24 you back out at 11:25. Please rise for the jury.

25 (The proceedings recessed.)

1 THE COURT: Mr. Price, are you ready to go?

2 MR. PRICE: I am, Your Honor.

3 THE COURT: Let's bring the jury in.

4 (The following occurred in the presence of the jury.)

5 THE COURT: At this time Mr. Price will give the
6 closing argument on behalf of Motorola.

7 MR. PRICE: Thank you, Your Honor. And thank you,
8 ladies and gentlemen, for so much. You know, I've got to ask
9 you to think about this: How many times in Mr. Harrigan's
10 presentation did he say that all Motorola had to do was
11 nothing, after November 9th?

12 You recall that on November 9th Microsoft filed a lawsuit
13 here. That lawsuit has been characterized by Microsoft. And
14 November 9th Microsoft sues for the third time in the Western
15 District of Washington. And Mr. Harrigan said at that point
16 Motorola didn't have to do anything. It didn't have to sue
17 Microsoft, it didn't have to ask for injunctions to be paid
18 on Motorola's patents. And doing anything after that,
19 seeking injunctions, seeking a determination by a court that
20 Microsoft, in fact, infringes our patents and owes money,
21 that none of that was necessary, because on November 9, 2010,
22 Microsoft came to this court and said -- through filing a
23 complaint -- that, Your Honor, we want you to determine a
24 RAND rate and we will pay that rate. No reason to do
25 anything else.

1 And Mr. Harrigan said that throughout his presentation.
2 It was kind of the key. He was saying: You need to evaluate
3 Motorola's conduct in light of the fact that here we were in
4 front of Judge Robart saying, "We will pay any rate you
5 determine." The problem with that is it is absolutely false.
6 It is not what Microsoft did.

7 And when you go back there, ladies and gentlemen, I'm
8 going to ask you to look at Exhibit 7241. 7241 is the
9 lawsuit that was filed. There is this cover letter that I
10 may talk about later where general counsel sent -- general
11 counsel of Microsoft sends it to the general counsel of
12 Motorola saying, "I'll look forward to talking again and to
13 no doubt reading in the very near the work of your very good
14 litigation team." But that suggests that they expect
15 something to be filed in response, not that they thought this
16 November 9th complaint would halt everything. They knew it
17 wouldn't.

18 If you look through this complaint it contains causes of
19 action saying that Motorola breached its RAND obligation. It
20 contains prayers for relief that they should be awarded
21 damages. That they want a decree that Motorola has breached
22 its RAND obligation. In one small section, in paragraph 9
23 you'll see it, it says, Microsoft seeks, among other things,
24 a judicial accounting of what constitutes a royalty rate in
25 all respects consistent with Motorola's basic RAND

1 obligations.

2 The one thing that's missing here is any commitment by
3 Microsoft to pay any royalty rate this court determines.
4 What Microsoft is asking for in this complaint is to get
5 damages -- and I'll explain that to you later, talk about why
6 they're not entitled to those damages -- and they're saying,
7 Your Honor, you set a royalty rate and then we can decide
8 whether or not we're going to accept it.

9 Because you've got to realize, Microsoft doesn't have a
10 contractual obligation to Motorola under that RAND
11 commitment. That RAND commitment, Microsoft is a beneficiary
12 of, a beneficiary of Motorola's obligations. But Microsoft
13 doesn't have to accept a license. Microsoft can say what it
14 said throughout. Microsoft can say, look, we don't think
15 your patents are essential patents. We don't owe you a dime.
16 We don't infringe your patents. We don't owe you a dime.
17 Your patents are invalid. Therefore, we don't owe you a
18 dime. They maintain the power to do that in this
19 November 9th complaint. And they know it.

20 It is misleading to get up here and tell you that they
21 said they would accept whatever RAND royalty that this court
22 came up with. And, in fact, it wasn't until Motorola had to
23 be put through all the hoops, that Motorola had to sue -- and
24 by the way, when Motorola sued, what was Microsoft's
25 response? Microsoft's response was, we do not infringe those

1 patents. Those patents are not essential. Those patents are
2 invalid. We don't owe you a dime.

3 They maintained that position up until the time they
4 actually had the threat of an injunction over their head.
5 And what the evidence will show is Microsoft understands that
6 that is the way RAND works, that the way RAND works and the
7 way it's enforced, so that someone like Microsoft will
8 finally come around and say, yes, they are essential. Yes,
9 we do infringe. Yes, they are valid. The way you get them
10 to do that is sometimes with the threat of injunction. And
11 I'm going to show you later that Microsoft, in fact, said
12 that to the FTC in 2011, that that's how you use these
13 lawsuits.

14 This November 9th lawsuit is not an agreement to pay a
15 dime. It's not a commitment. As a matter of fact, you can
16 imagine how easy it is to say: We will pay you the RAND
17 rate. We commit to that. We're not going to say that the
18 patents aren't any good. We're not going to say we don't
19 infringe. That would be a very easy thing to say, and
20 Microsoft never said it.

21 I asked Mr. Gutierrez about this and this is I think --
22 here we go.

23 "Question: It would be very easy to write down on a piece
24 of paper: We will accept a RAND rate. We will pay Motorola
25 a RAND rate. You can do that in five seconds, right?

1 Correct?

2 "Answer: Yes.

3 "Question: The first time that was ever done verbally or
4 in writing was in September of 2011, correct?"

5 Then Mr. Gutierrez at that point said, "I don't know that
6 for sure." But what he knew for sure was this lawsuit was
7 filed November 9, 2010. What he knew for sure is this
8 lawsuit did not say that Microsoft was actually committing to
9 pay a RAND rate. They still had the option and actually
10 elected that option throughout this time period of saying, we
11 don't have to pay anything. Yes, judge, come up with a RAND
12 rate, but we're not committing to pay it. We're saying the
13 patents aren't any good, and that we don't infringe, and that
14 we don't owe a nickel.

15 If Microsoft really wanted to avoid all this and say, we
16 will pay a RAND rate as determined by the court, it would
17 have been a very, very simple thing to do. But they didn't.
18 They put Motorola through the hoops of having to go to courts
19 and try to establish that these were good patents, that, in
20 fact, Microsoft used these patents, and that whatever the
21 rate that was determined, Microsoft had to pay.

22 In fact, you also saw the evidence -- we read into the
23 evidence a statement by the court. And this is Slide 19.
24 This was the court's order, May 14, 2012, where he says,
25 "Although an express statement that Microsoft seeks a license

1 for Motorola's standards-essential patents is missing from
2 its complaint" -- there is nothing in there saying that they
3 will actually get a license and pay -- "in its recent papers
4 to the court Microsoft has affirmatively stated that it is
5 ready and willing to take a license to such patents on RAND
6 terms." And here we're talking about recently. Recently
7 compared to May 14, 2012.

8 And the way we got there -- the way we got there where
9 Microsoft finally said, yes, we will pay -- is Motorola had
10 to go through these lawsuits and had to go through these
11 hoops. And now Microsoft is complaining that we did that to
12 finally get them to agree that they would pay a RAND royalty.

13 In fact, what this case is about is it's an example of a
14 large, powerful company playing hardball and stage-managing
15 litigation to get what it wanted. And in this case what it
16 wanted was to dominate the market for the operating systems
17 on smartphones. And what happened here is Microsoft's
18 actions were totally inconsistent with the custom and
19 practice in the industry. But Motorola's response to
20 Microsoft's actions were not only reasonable, given the time
21 pressures and given the context, not only were they
22 consistent with custom and practice, but Microsoft
23 anticipated exactly what Motorola was going to do before they
24 started this fight.

25 Microsoft knew what was going to happen. I don't know if

1 you recall, I was examining Mr. Gutierrez. And this is Slide
2 21. And Mr. Gutierrez -- I asked:

3 "You knew that they," meaning Motorola, "were going to
4 file a lawsuit on any patents they thought they could use
5 against you and say: We have value. You have value. You
6 knew that as of October 1, 2010?

7 "Answer: We expected that, yes.

8 "Question: Therefore you would expect them to file
9 lawsuits on standards-essential patents if they thought they
10 brought value to the table. You said that yesterday,
11 correct?

12 "Answer: Yes."

13 When Microsoft filed this lawsuit on October 1st, 2010,
14 they knew it would have been the standard in the industry,
15 the custom, that Motorola would sue back on the patents it
16 thought had value. Standards-essential patents and
17 non-standards-essential patents. That was their expectation.
18 And it didn't bother them at all that that was going to
19 happen. It didn't bother them a whit whether or not that was
20 going to happen.

21 And the reason it didn't bother them, even though they're
22 now saying what Motorola did was outrageous, that it caused
23 them harm, they knew that Motorola was going to sue on these
24 patents, it didn't bother them because they knew they were
25 protected. They knew that Motorola could not make them enter

1 into any license or pay anything that was greater than RAND.
2 And they knew that you never get an injunction unless a court
3 determined that that's what had happened, that Microsoft was
4 unwilling to pay RAND.

5 Now, remember, Microsoft didn't start this whole
6 litigation, I mean, didn't start -- didn't file the
7 October 1st complaint in order to get a license from Motorola
8 for technology Microsoft knew it was using. I mean,
9 Microsoft had these, for example, these WiFi toggles to Xbox
10 since 2002. Microsoft has known since 2002 it's using the
11 WiFi standard. Okay? Microsoft knows which companies have
12 declared patents essential on that standard.

13 The lawsuit didn't begin with Microsoft coming and saying:
14 Oh, by the way, we'd like to get your permission to use your
15 technology, even if it's a sliver, or whatever. They didn't
16 come forward and say, that's what we're trying to get. And,
17 in fact, they know they don't have to. Their whole business
18 model is premised on the fact that they don't have to, that
19 they aren't afraid of people coming forward and saying, you
20 owe us a lot of money or we're going to stop you. Because
21 they're protected.

22 You remember that Mr. Gutierrez said, when he was on the
23 stand he talked about -- I'm going to put up a slide which
24 Microsoft used. I think it is Slide 1. You recall you were
25 shown this slide which had 92 companies that had patents

1 essential to 802.11, and that's the WiFi standard. Okay?
2 And you recall I was talking to Mr. Gutierrez up here and
3 said: They didn't have licenses with the majority of those
4 companies on WiFi. He said, probably not more than half the
5 companies. And yet, as you heard, Microsoft has invested
6 millions and millions and millions of dollars into Xbox.
7 It's created this WiFi toggle. It put WiFi into the Xbox.
8 And yet it didn't go to all of these companies and say, hey,
9 we'd like a license. What if that company was unreasonable
10 and later came forward and sued and said, you owe us a lot of
11 money, we want an injunction. Couldn't that stop your
12 business in its tracks? Couldn't that put the fear of --
13 whatever fear you have -- into you? And the answer is no.
14 It doesn't. It doesn't put Microsoft into fear. And why is
15 that? Well, the reason is because they have a license if
16 they're willing to pay RAND. And Mr. Gutierrez said that.

17 If we can go now to -- this is from the trial.
18 Mr. Gutierrez was asked, "One of the things you can rely on,
19 you don't need to contact these companies, because there's
20 the RAND obligation, correct?" And he said yes. "Answer:
21 That's correct." Remember I asked him: You don't know if
22 these companies you haven't approached are reasonable or not,
23 some could be really unreasonable. You know, somebody could
24 come out of the woodwork and say, we have a
25 standards-essential patent, we're going to hold you up, we're

1 going to put a gun to your head, we're going to give you a
2 ransom note.

3 But the reason Microsoft isn't afraid of that, and the
4 reason it still invests millions and millions in Xbox and
5 other technologies, is because it knows that the most the gun
6 can have is a flag coming out saying, "Boo." And it knows
7 the ransom note is totally ineffective because they are
8 protected by the law.

9 In fact, this is the question to Mr. Gutierrez. "So even
10 if you think some people here, that you don't know, might be
11 unreasonable" -- that's referring to all those people who own
12 standards-essential patents -- "Microsoft feels comfortable
13 going forward with its investment in Xbox because it has the
14 protection of RAND. These people aren't entitled to more
15 than a reasonable non-discriminatory rate, correct?" And the
16 answer is, "Yes." They aren't. So we're not afraid of
17 people saying they want more. We're not afraid of people
18 suing us saying they want an injunction, because they're not
19 entitled to one unless we're unwilling to pay a reasonable
20 and non-discriminatory rate. And who determines that? The
21 court.

22 And I think Mr. Treadwell testified about that:

23 "So what you talked about was that Motorola couldn't just
24 stop Microsoft from selling Xboxes; they would have to get
25 some sort of approval from a government entity or from a

1 court, right?

2 "Answer: That's correct. We knew that Motorola would
3 have to have some government-sponsored entity that would be
4 the thing that actually enjoins us from shipping Xbox or from
5 selling Xbox.

6 "Question: So there would have to be some finding by some
7 entity that that was a reasonable and appropriate thing to
8 do? Motorola couldn't do that on its own?" And the answer
9 is, "Yes, that's correct."

10 By the way, this is the context to which Mr. Murphy,
11 Professor Murphy, I'm sorry, paid no attention whatsoever.
12 That is the context of, if you're trying to think
13 economically, from an economist's point of view or from a
14 rationality point of view, what would you try to do? Would
15 you try to hold up someone? Well, he didn't take into
16 account what Microsoft takes into account every day in its
17 business, which is, we don't have to fear people who are
18 unreasonable or who ask for injunctions, because we don't
19 have to identify them, because they can't obtain injunctions.
20 They can't make us pay more than RAND. There is no question
21 that that's the law, and that Motorola knows that's the law.

22 That's what you have to think of when you're looking,
23 then, at what happened in this case. Because what happened
24 is that Microsoft filed a lawsuit. It knew what was going to
25 happen in response. It knew it. It wasn't surprised. It

1 wasn't shaken. It wasn't put in fear. And it then
2 stage-managed it so that we're here now and Motorola is
3 defending what it was required to do to finally get Microsoft
4 to say -- to commit to say, we are going to pay RAND.

5 So let's look at that just for -- go through it kind of
6 chronologically so you can see the totality of what was
7 happening here.

8 Now, Microsoft in the 2009/2010 timeframe was in a bit of
9 a crisis, in a bit of a crisis because its operating systems,
10 you know, on the personal computers, has had great success.
11 I'm sure you all know that. It had like 90 percent of the
12 market of operating systems on personal computers. But the
13 market had changed. The market was changing so that you had
14 operating systems not just on personal computers, but you had
15 laptops, you had tablets, you had iPhones.

16 And Mr. DeVaan was here from Microsoft, and he explained
17 that when you look at that bigger market, that Microsoft's
18 share was getting down to like 30 percent. In fact, he said
19 that since the iPhone came out in 2005, which had multi-touch
20 functionality, that from then forth it declined until
21 Microsoft came out in October 2010 -- a date you know about
22 -- with the Windows iPhone 7 (sic), which is the first time
23 they had multi-touch. But the market was getting away from
24 them. There was the iPhone. There was Apple. And there
25 was, of course, also, Android. And that market was getting

1 away from them because Motorola, which had used Windows
2 technology for its operating system, had announced it was now
3 committed to Android, which was a multi-touch operating
4 system.

5 So, Microsoft here is in a bit of a crisis. And they want
6 to make a statement. And they're going to plan how to make
7 that statement. And by "plan" I don't mean just plan what
8 they're going to do, but they're going to plan and anticipate
9 what their opponent is going to do. So leading up to
10 October 1, 2010, we have the following:

11 Motorola engages in what you have been told is the
12 standard custom and practice in the industry, and that is to
13 try and negotiate these disagreements among companies. And
14 what happens is, you remember that Motorola had this
15 ActiveSync technology that it had a business license from
16 Microsoft for, it was four years, \$100,000, not a big amount
17 of money. So what happens is that license expires and so
18 Motorola is trying to contact Microsoft to say, hey, let's
19 get a deal together again where we have a license. And it is
20 Motorola that has to keep kind of pursuing this and try to
21 engage in the standard custom and practice of, you know,
22 we're going to talk about this.

23 So in December 2007 Motorola sent Microsoft a draft
24 agreement to continue the license. It wasn't until -- I'm
25 bad in counting months, apparently, and years, but this is

1 August 2008, so let's say eight months later, that Microsoft
2 sends Motorola a draft patent-license agreement for these
3 ActiveSync patents. And that's the first time they have sent
4 a patent-license agreement, as opposed to a
5 business-technology agreement.

6 So then Motorola did what you've been told, it's
7 undisputed, is the standard practice in the industry. They
8 said, oh, you've got patents, give us claim charts which show
9 how the patent deals with what we're doing. And Microsoft is
10 in no hurry. It's like over a year later when they finally
11 send claim charts for these patents. And, by the way, this
12 was all testified to by Mr. Dailey. It was concerning
13 discussions with a Joy Murray. And Ms. Murray never came
14 here to dispute any of this. Mr. Gutierrez, who had nothing
15 to do with any of this, characterized it later. But what
16 actually happened is undisputed.

17 And so finally, in January of 2010, Kirk calls up Joy to
18 say, "Hey, let's have a broader licensing discussion." And
19 she says, "I don't have the authority. I'll call you back."
20 And she never called back. Again, this is undisputed.

21 And, by the way, this is misleading, or you have been
22 misled here. You heard Mr. Harrigan say a few times that
23 Mr. Dailey had done a search of Motorola's patent portfolio
24 to try to come up with patents to assert against Microsoft.
25 And that's not true. What he said was: We knew we had a

1 patent for wireless e-mail sync, which is similar to the
2 ActiveSync patents they sent us. It was not a
3 standards-essential patent, and I wanted to talk to them
4 about that. That was it. There was no, "Let's look at our
5 portfolio." There was in October, when they spent a million
6 dollars in one month looking at their portfolio to try to
7 find out how to respond to Microsoft's lawsuit, but not then.

8 And then in May, Kirk actually sort of crashes this
9 conference, or invites himself to this conference in DC, to
10 try to talk to Microsoft general counsel about this issue
11 which is just out there and has been out there for awhile,
12 you know.

13 And then later he sets up, with Mr. Gutierrez, an August
14 meeting. And that's postponed due to "scheduling issues."
15 So Motorola thinks, okay, it's postponed. And you heard what
16 Mr. Dailey said, that they then set up an October 22, 2010
17 meeting to talk about this fairly small, insignificant issue
18 about ActiveSync patents. And what we didn't know -- and
19 this is contrary to industry-standard practice -- Mr. Dailey
20 said, if you have an issue with someone about patents in this
21 technology industry, what you do is you sit down and you say,
22 we think you're infringing our patents, here's our patents,
23 here's our claim chart, go examine it. They go examine it.
24 They come back with their patents. Well, we think you might
25 be infringing these. And that can go on for a long time,

1 because you have to analyze patents. And then when that
2 breaks down, there might be a lawsuit.

3 But, what happened in this case is that as Mr. Dailey was
4 engaging in these discussions about ActiveSync, Microsoft was
5 secretly, and behind the scenes, preparing an Android
6 lawsuit, a lawsuit about Motorola committing its company to
7 Android. Can you put up Slide 41? Remember I asked
8 Mr. Gutierrez:

9 "And so you're saying that the analysis for suing Motorola
10 and expecting what they're going to sue back on took place,
11 you think, several months before that? You said spring?"

12 He said, "I'd probably say the late spring of 2010."

13 "So late spring, your seasons may be different from mine,
14 I'm not sure. So give me your best estimate."

15 And he says he's from the tropics, and he's thinking
16 April. So that's why, on our timeline, you have the spring
17 from the tropics and also here, April. Beginning in April
18 Microsoft secretly begins preparing to sue Motorola on
19 patents it has never mentioned to them before. Not just sue
20 Motorola on those patents, but also, also, anticipate the
21 lawsuits that are coming back.

22 Remember, Microsoft knows it's using the standard.
23 Microsoft knows that Motorola is one of the
24 standards-essential companies that has declared. And
25 Microsoft knows it's not been paying anything. It's

1 anticipating exactly what's going to happen. But the thing
2 is, they have six months to prepare for this. I think I've
3 counted that correctly. They have six months. Six months to
4 secretly prepare.

5 And then October 1st they file a lawsuit. And, remember,
6 we went through that complaint, there were nine causes of
7 action? Seven of them are Android. And Mr. Gutierrez
8 said -- this is 42 --

9 "And we've got seven patents now, and all of them pertain
10 to Android operating software, correct?

11 "Answer: Correct.

12 "And none of them were ever discussed with Motorola prior
13 to the lawsuit being filed, correct?

14 "Answer: Correct."

15 Now, there's nothing illegal about that. But it's
16 contrary to the standard, the custom and practice in the
17 industry, to have a surprise attack, you know. And we're
18 talking about it mainly because it deals with the context in
19 which Motorola had responded. It didn't have six months, you
20 know, to come up with a response, and to look through all of
21 its patents, and to do thorough investigations. It could
22 have if they had had negotiations. But this was, as you
23 heard from Mr. Dailey, as you heard from Mr. Taylor, this was
24 a surprise attack.

25 And Microsoft was a sophisticated player in this industry.

1 It knew that in response to this, Motorola would sue. It
2 knew that that is what was going to happen.

3 So, let's talk about the lawsuit. And first of all, the
4 October 1, 2010 lawsuit. And you heard Mr. Harrigan say:
5 Oh, this basically wasn't really a big deal, because Motorola
6 could design around patents or just pay a royalty, and this
7 would be resolved. Well, this was a huge deal. These
8 Android patents are not standards-essential patents. So you
9 don't have to -- you can't insist on a RAND royalty.
10 Basically, Microsoft could charge whatever it wanted. If you
11 didn't pay it, they could keep you from using that
12 technology, because it's not covered by RAND.

13 And, yes, it's not standards essential for being in the
14 industry, I mean, for having software on your phone. But
15 it's essential for doing Android on your phone. Microsoft
16 was saying, these patents are why you can put Android on your
17 phone, Motorola. And we're seeking an injunction preventing
18 you from doing that. And Motorola had committed its company,
19 in a bet-the-life move, on the Android operating system. And
20 so this was a huge deal. Yeah, can you design around? Maybe
21 you can. Maybe you can't. It wouldn't be Android. And
22 that's what Microsoft was saying, is, you've got to take this
23 stuff off your phone and come up with something else.

24 Now, by the way, Mr. Harrigan says we should have just
25 capitulated, we should have just paid them. If you recall,

1 there was a proceeding in the International Trade Commission,
2 because Microsoft sued there. And it says:

3 "And, in fact, if you look at the situation today, the
4 October 1st lawsuit in the ITC, there was a finding that
5 Motorola did not infringe the Android patents that you
6 allege, except for one ActiveSync patent; isn't that right?

7 "Answer: That's correct."

8 So, yes, we could have capitulated. We could have been
9 fine with Microsoft. But we didn't. Because we didn't think
10 we were infringing their patent. And the ITC found that we
11 didn't infringe those Android patents. They found we
12 infringed one of those ActiveSync ones, which isn't essential
13 to Android, and that we were working around that, but not
14 these Android patents. Later Mr. Gutierrez tried to say, oh,
15 I'm not sure they said we didn't infringe, but there was some
16 technical reason why Motorola won that.

17 So this was not a small matter for Motorola. This was, in
18 fact, a company-threatening lawsuit. Remember where we were
19 then? Motorola was spinning off its businesses so that
20 Motorola Mobility had just the mobility patents and was going
21 to begin that business. And that we were losing money. And
22 that Microsoft's sales were like eight times what Motorola's
23 were. And with all this going on, this lawsuit is filed out
24 of the blue, contrary to any expectations.

25 And that's the context in which we then go to what happens

1 next. Because you'll remember Microsoft said, we know you're
2 going to sue us. Microsoft knew that. In fact, they
3 encouraged us. You heard Mr. Taylor say, Microsoft said,
4 you're going to have to sue to establish the value of your
5 patents. The value wasn't just the rate, it's whether or not
6 they are actually any good. It's whether or not Microsoft
7 actually has to pay. And so in response to that, you've
8 heard the testimony of Mr. Dailey about the October letters,
9 and also you heard the testimony yesterday from Mr. Taylor.

10 And let's look at these letters now. If we can go to the
11 timeline, the October 1st lawsuit. October 11th, Microsoft
12 unveiled the Windows Phone 7. So, you know, we don't have
13 like direct evidence that all of this was about trying to
14 stop the industry from going to Android, and go to the Phone.

15 All we have is, you know, the fact that it was a surprise
16 attack, the fact that Motorola had gone Android, the fact
17 that Microsoft was unveiling its Windows Phone 7. We have
18 all those facts. That's called circumstantial evidence. And
19 it can be just as compelling as someone with a confession.
20 You heard the court's example. There are other examples. If
21 eight people go to work one day, it's not St. Patrick's Day,
22 they're all wearing green. There might be circumstantial
23 evidence that there is an agreement that they're going to
24 wear green. And that's just as compelling as having someone
25 come in and contest it. So, circumstantial evidence is

1 compelling here as to what was happening and why it was
2 happening.

3 So you go to these letters -- and I'm going to focus on
4 the October 21st one, because the October 21st one and the
5 October 29th one are really quite similar. And the question
6 is, in this context, what was reasonable for Motorola to do?
7 And you heard Mr. Taylor say, look, we had 24,000 patents.
8 We're trying to put our patents on the table. We spent a
9 million dollars that month trying to examine those patents,
10 because we're doing this quickly, we don't have six months.

11 The one thing we know we have, because it's already been
12 declared, are the standards-essential patents. Those are
13 easy to identify, because we've declared them. We did those
14 claim charts years ago, and we know that Microsoft is using
15 WiFi. And so, okay, we can send out a letter on the
16 standards-essential patents. And when we sued later, by the
17 way, we also sued on non-standards-essential patents, such as
18 the wireless e-mail patent, because we had some time to look
19 at them. We spent that million dollars.

20 But the first thing, okay, we know the standards-essential
21 patents. We send the October 21st letter, which I think is
22 Exhibit 1, which contains, attached to that, is the actual
23 patents. This is putting patents on the table. And the
24 second thing we're asked is, well, what royalty rate do we
25 put on it? And one thing that Microsoft hasn't talked about,

1 which Mr. Dailey talked about, is we need to be reasonable
2 and non-discriminatory.

3 We know, and Mr. Taylor told you, that for -- let's see,
4 Mr. Taylor said that for the last twenty years -- I'm sorry,
5 Mr. Blasius said, "For the last twenty years the rate we've
6 used when we started negotiations on our technology is 2.25."
7 And Mr. Blasius, who was the patent licensing manager, said
8 that. The rates have been negotiated for 20 years with
9 companies that have patents. Sometimes it's less. It's not
10 take-it-or-leave-it. It's our starting rate. They enter
11 into negotiations, they enter into cross-licenses and trade
12 value. That's what we knew.

13 And largely, because the industry we knew was the
14 cell-phone industry. And in the cell-phone industry you are
15 applying a rate to the end product. That's what we knew.
16 That's what we had experience in. And we didn't have six
17 months to prepare for this, we had to do this in a matter of
18 weeks.

19 And so you heard the testimony that we thought it was
20 reasonable to send out a letter, which is a beginning offer,
21 that puts in our standard rate -- which we've given to
22 others, so it's not discriminatory -- on the end product.
23 And say, okay, basically we're willing to talk. And if you
24 took at that letter, that's what the letter says. It is not
25 a demand, it is an offer.

1 It goes on to say that -- let's go to the next slide, next
2 paragraph. You may not want to license all these. We're
3 willing to enter into a license on RAND terms. We're going
4 to leave the offer open for 20 days. And you remember
5 initially Microsoft made a big deal as if there was something
6 sinister about the 20 days. But then we showed you, I think
7 it was Exhibit 7252, which is a letter to Mr. Dailey from
8 Mr. Gutierrez where he has the exact same kind of language,
9 that Microsoft will leave the offer open for 20 days, please
10 confirm. And that's because you want these negotiations to
11 get started. It's what we've used for 20 years. It's what
12 we could come up with right away. It was not intended, at
13 any time, to be the end of discussions.

14 And the court has told you that that first offer does not
15 have to be RAND. It would be kind of a crazy obligation to
16 put on someone that they have to come up with a RAND rate
17 right away. What the court said that you've got to listen to
18 and look at -- and it's Instruction 16 -- is whether or not
19 this was, among other things, was this reasonable
20 commercially under the circumstances? Reasonable means under
21 the circumstances. You've got to ask yourself, what was the
22 subjective intent of Motorola? Was Motorola trying to engage
23 in what was called a hold-up here? Those are the questions
24 you have to ask.

25 And the criticisms, among the criticisms of that offer

1 are, well, we didn't consider patent pools. And you heard
2 Mr. Dailey say, yeah, we didn't. We put in our standard
3 offer. And, by the way, for the WiFi technology, you've
4 heard about the MPEG patent pool. Well, don't be confused,
5 that wasn't for WiFi, that was for the video compression.

6 You've heard testimony that Microsoft actually had
7 interest in a patent pool called Via. Via, which would have
8 covered WiFi. And the Via patent pool really has no effect
9 on the marketplace, very few people joined it. And
10 Microsoft, though, did participate in those discussions, and
11 it dropped out. Just as Motorola did with MPEG, and dropped
12 out. So, you can't really infer anything from the fact that
13 you have discussions with a patent pool and you drop out.
14 Because Microsoft does the same thing.

15 So, they said you should have considered Via. They say,
16 you should have considered the InteCap study. The InteCap
17 study concerned, again, WiFi. It was a study in 2003. It's
18 a study that Mr. Dailey and Mr. Taylor said they did not know
19 existed, because they only had a short period of time here to
20 put this together. And they didn't know this seven-year-old
21 study existed. If you look at the study itself -- again,
22 this is 2003 -- you would notice that it doesn't contain a
23 lot of these WiFi patents that Motorola has, because -- I'm
24 putting up here now Exhibit 1 -- at the end of Exhibit 1,
25 that letter, we list the patents that are the WiFi patents.

1 And you look through them, and a great deal of them are after
2 2003. They are patents that were acquired after the InteCap
3 study.

4 So, basically, given the context of what was happening
5 here, Motorola did the best it could to get an offer out
6 there where it expected to start negotiations. Did it expect
7 an acceptance? No. That's not what you get in this
8 industry. And you heard Mr. Gutierrez say that 99 out of a
9 hundred times he says no, we're going to negotiate. And
10 that's what Motorola expected. Motorola's goal, Mr. Dailey's
11 goal, was to start negotiations to arrive at a zero-zero, as
12 he said, zero-zero sort of place.

13 Before this lawsuit, Microsoft and Motorola had lived in
14 patent peace for years. You heard Mr. Taylor say that, we
15 wanted kind of a zero-zero agreement where we're all using
16 each other's patents and no one pays anything. That would
17 have been a great deal for Microsoft, because their Android
18 patents, we didn't infringe them. That's what the ITC
19 determined. We did not infringe those patents. So why would
20 we pay them anything? So, when you're negotiating all these
21 patents, zero-zero would have been a great result for
22 Microsoft, because Microsoft does infringe our patents, and
23 we're entitled to be paid whatever the reasonable amount of
24 the discriminatory rate is on that.

25 So, when you look at the October letter you've got to ask

1 yourself, was this something that was staged by Motorola to
2 get some advantage to try to get hold-up? And what the
3 evidence shows is that it wasn't staged by Motorola to get
4 hold-up, that makes no sense whatsoever. It's being staged
5 by Microsoft now, because they're trying to put that and
6 freeze that in a point in time and say, forget everything
7 else that happened that would tell you what was really going
8 on there. Because when you ask yourself, really, just your
9 common sense, what advantage does Motorola get by sending out
10 an offer that Motorola thinks -- intentionally sending out an
11 offer it thinks is outrageous, that's outrageous.

12 Well, you can't get patent hold-up unless someone agrees
13 to do that. Patent hold-up is getting a value above the
14 incremental value of your patent to the standard. And the
15 court's not going to give you that. The court is going to
16 rule that you get a reasonable and non-discriminatory rate,
17 period. And so sending out that letter, how would that help
18 get an agreement for that high rate?

19 You heard Mr. Harrigan say it was ridiculous, it was
20 unreasonable. It is not -- if you're a rational person, it's
21 not what you'd send out if you're trying to accomplish
22 hold-up.

23 And we know that it's not the sort of thing that would
24 affect Microsoft. You heard Mr. Gutierrez actually say, in
25 May of 2013, after all this had taken place, you know, after

1 we had sent those letters, after we had lawsuits,
2 Mr. Gutierrez was asked, "You don't know of any context in
3 which Motorola has taken the position" -- I'm sorry, Ken, 7.
4 That's a good one, but I'll get back to it in just a second.
5 "It's true that, though, as of May 20, 2013, you could not
6 think of any circumstance in which Microsoft would make a
7 counteroffer that was higher than Microsoft thought the
8 patents were actually worth?" He said, "That's correct. We
9 wouldn't volunteer to overpay." He says this in May of 2013,
10 after all of this had taken place.

11 Motorola would never expect Microsoft to say, oh, you're
12 asking for the sun, the moon, and the stars, and therefore
13 we're going to give you the moon. That is not what one would
14 expect in this industry. There would be no reason for
15 Motorola to intentionally send out an outrageous offer if it
16 thought -- if its goal was to get hold-up.

17 So then you look, okay, what's the other way it's going to
18 have an effect? And you heard Mr. Harrigan say, well, this
19 was to clear the way so that Motorola could sue, so Motorola
20 could sue and get more than the reasonable and
21 non-discriminatory rate. And the problem with that is a
22 court won't give you that.

23 And think to yourself: Okay. Rational person. I'm
24 setting up a lawsuit so I can go in and say, Your Honor,
25 they're refusing to pay what I said was a reasonable and

1 non-discriminatory rate. Here it is. And what would their
2 response be? It would be the response you've seen here,
3 where they do multiplication and show you wads of dollars and
4 say, look how ridiculous this is, and look how this compares
5 to the price of a computer, and look at the royalty stacking
6 and all of this. That's what would happen. It doesn't give
7 you any advantage to be unreasonable before going to court.

8 I mean, you're going to be asked was Mr. Dailey and Mr.
9 Taylor, were they doing what they could under the
10 circumstances, responding reasonably, under that context, in
11 good faith? Or were they trying to set up a lawsuit so that
12 they would come in here and be ridiculed? It is not behavior
13 that you would use if you're trying to get some advantage in
14 a lawsuit.

15 And, finally, Mr. Harrigan said that, well, it paves the
16 way for a lawsuit. And the question is, how would it pave
17 the way? It was suggested in some of the questioning that,
18 well, you know, Motorola had its own internal policy that it
19 would sit down and offer before suing. And that's true.
20 Mr. Dailey testified to that, that was the standard practice
21 through the years. "Now, your practice was that you would
22 not have filed a lawsuit on standards-essential patents
23 without first making an offer?" He said, "Our practice is to
24 negotiate and not litigate unless we can find no good result
25 in the negotiation." That's the standard practice.

1 We've been sued now. And so Microsoft is saying the
2 reason we sent out the offer was so that we can check off our
3 internal checklist, so offer, then sue. There's no evidence
4 of that. You are expected to sue when you are sued. That's
5 what Mr. Gutierrez said.

6 And did we ever -- here's really what, and this is where
7 I'm going to bring this back up, because I liked it, but Ken
8 brought it up too soon -- is that, did Motorola ever go into
9 these lawsuits and say, hey, lookie here, we made this offer
10 and therefore that entitles us to sue? No. And that's what
11 Ken brought up earlier. I asked Mr. Gutierrez, "You don't
12 know of any context in which Motorola has taken the position
13 that because it sent out these October letters, that gave
14 them the right to sue Microsoft for an injunction or for
15 damages. You know of no context in which that's the case?"
16 The answer is, "No."

17 So the evidence is compelling, if you do the hypotheses,
18 was Motorola trying to send out these offers to get hold-up?
19 The answer is no. It would have been irrational to send out
20 those letters for that purpose. What Motorola expected was
21 negotiation. That's what, by the way, the standards-setting
22 organizations expect.

23 Exhibit 38, you saw the contracts with the
24 standards-setting organizations where it says, "Negotiations
25 are left to the parties concerned and are performed outside

1 the organizations." A good illustration is what happened
2 with Marvell. What happened with Marvell when Motorola sent
3 out its offer, its 2.25 percent? Marvell came back and said,
4 you know, we have standards-essential patents, too. We said,
5 that's great, let's talk about that. And we said, let's look
6 at your claim charts. They said, okay, we'll give you our
7 claim charts. They didn't. I mean, they dropped it, as I'll
8 discuss later, because they were only doing it because
9 Microsoft had a loaded gun to their heads, unlike one that
10 would just shoot out a flag that says "Boo."

11 But that's what we expected, what Marvell did, which is
12 you negotiate. We learn about your business. We learn about
13 what makes sense. We learn about your products. We learn
14 about how this technology affects you.

15 And what happened here -- and this is from
16 Mr. Gutierrez -- is undisputed. When you look at the
17 instructions it's going to say, did this frustrate the
18 purpose of the contract? That's one of the things you're
19 going to be asked. It did not frustrate the purpose of the
20 contract, because as Mr. Gutierrez said, what happened when
21 these letters went out is we had bilateral negotiations that
22 encompassed these patents. They weren't singled out. It
23 wasn't like Motorola was saying, hey, look here, we're
24 insisting on this. But bilateral negotiations went forward.

25 If we could play -- I think this was played during the

1 trial for you -- and so it's Slide 13. This is
2 Mr. Gutierrez.

3 (Mr. Gutierrez's video deposition was played as follows:)

4 "Question: Mr. Gutierrez, given your experience as
5 to how these negotiations typically proceed, you know, is it
6 your understanding that in instances where a potential
7 licensor says this offer is open for 'X' number of days, is
8 it your understanding that that somehow prevents Microsoft
9 from making an offer after that 20 days?

10 "Answer: No, it doesn't prevent the other party from
11 making an offer. But, in fact, we were having -- in parallel
12 with these discussions, with the receipt of these letters --
13 we were having licensing discussions of a broader scope that
14 would have encompassed the subject matter of these letters.

15 "And I think it's noteworthy that in the context of those
16 conversations these particular set of patents and
17 technologies were never raised by Motorola as the focus of
18 their dialogue with us. Instead, in our multiple meetings,
19 at executive levels and others, they were really focused
20 elsewhere in terms of trying to resolve the disputes between
21 the two parties, generally. And these topics were never a
22 priority for them in terms of trying to address them.

23 "And we were having licensing discussions, even on the
24 same day in which the first letter was received on October
25 22nd, there was a face-to-face meeting between the general

1 counsels of both companies, and Mr. Kirk Dailey and myself,
2 where we discussed these -- the overall patent dispute
3 between the parties and the desire to move forward.

4 "So, the letter has to be looked at in the context of the
5 realities of the dynamic of the engagement between the two
6 companies at that time. And we received no signal from
7 Motorola that this was really a matter that they wanted to
8 handle as a separate-track negotiation, apart from the
9 overall discussions that we were having."

10 (The videotape excerpt concluded.)

11 MR. PRICE: The context of the reality of the
12 engagement is how you have to look at these orders. There
13 was a track that encompassed all the patents. Hopefully
14 getting to zero-zero, which as I said, would have been a good
15 deal, that did not frustrate the purposes of the RAND
16 obligation. What happened is the parties did have
17 discussions. It was after, however, the litigation staging,
18 which I'm going to talk to in a second. Because what
19 happened immediately after sending that letter is on October
20 22nd there was a meeting between Mr. Gutierrez and Mr. Dailey
21 and the two general counsel. And did Mr. Dailey or anyone
22 say, this is outrageous. Or, hey, why would it be in our end
23 product? Or, do you know how many people there are out there
24 who have patents on the standard? Or anything they said to
25 you today? No. He said, he joked, "We got your missive."

1 They had a discussion, and that was it.

2 And Professor Murphy says, oh, it wouldn't have been
3 rational for them to say anything. And, folks, it doesn't
4 cost anything when you're meeting with someone face-to-face
5 to simply say, we disagree; or simply say, this is
6 outrageous, we think; or simply say, we want more time to
7 respond; or simply say, guys, you guys are crazy. We're
8 going to have to talk on a different level here if we're
9 going to talk at all. It doesn't cost anything. And from
10 the time those letters were sent until November 9th, in that
11 timeframe -- Ken, if we can put up the --

12 From October 22nd until November 9th, in that timeframe
13 there wasn't a peep from Microsoft about those letters.
14 There wasn't a call saying, that's outrageous. There wasn't
15 a call saying, you violated the law. They called us right
16 after suing October 1st, they said they had like three or
17 four calls, you know, at different levels. They called us
18 after suing November 9th. They didn't call at all between
19 October 22nd and November 9th, because they weren't
20 interested in actually talking at that point. They were
21 interested in setting up the stage for their overall
22 litigation. Because, remember, they anticipated, they knew
23 we were going to sue on those patents. Mr. Gutierrez says
24 they knew from the beginning. That's their six-month
25 analysis as to what's going to happen. So they know we're

1 going to sue. It's a standard custom and practice. They set
2 this up so they could sue a day earlier.

3 And, by the way, when they sue -- as I said, they sued
4 here, and they didn't, again, say, we will pay any RAND
5 royalty rate. They didn't say that, you know. So you've got
6 to ask yourself, why did they sue here? Well, it's the
7 Western District of Washington. It's Seattle. Welcome to
8 Seattle. Where, of course, Microsoft is located. Motorola
9 sued in other districts, closer to where Motorola was
10 located, and also in the ITC.

11 So, there's litigation strategy going on here. But the
12 November 9th lawsuit has nothing to do with saying: We admit
13 we're using your patents; we admit we infringe; we admit
14 they're valid; we will pay you what the court says. We never
15 got that. We had to fight for that. And fought for it we
16 did when we filed the November 10th lawsuit.

17 Now, two things: Microsoft now pretends that this was
18 outrageous, the negotiations that took place after that, and
19 you heard testimony on them from Mr. Gutierrez. Those were
20 bilateral negotiations trying to come to a resolution. Those
21 negotiations are not a violation of RAND obligations. We
22 know that because that's what Microsoft told the FTC in June
23 of 2011, after all this took place in November, after the
24 lawsuits, after the ITC lawsuit. What happens after all of
25 that? Well, Microsoft is making representations to the FTC

1 as to what patent hold-up is. And what sorts of things you
2 should be concerned about in patent hold-up.

3 And if we can put up, I think it's 2970, it's
4 Exhibit 2970. And, by the way, when you look at that back
5 there, this is telling you what Microsoft thought the custom
6 and practice was in the industry, what they thought it was,
7 what they thought was reasonable in June of 2011. And this
8 is after all those lawsuits are filed, before the German
9 lawsuit, which we'll get to, but after the lawsuits Motorola
10 filed in November.

11 And the first page of it is June 14, 2011, sent to the
12 commissioners of the FTC and the staff. You're going to get
13 a version which is redacted. The stuff we didn't read into
14 the evidence is blacked out, because we want you to focus on
15 what's relevant to this trial and not for other issues. So,
16 when you look at it you're going to see lots of black or
17 white spaces, I'm not exactly sure exactly how it was done.
18 But among the things that Microsoft said, and this is -- if
19 we can get to page 49 here -- "Concerns about patent hold-up
20 should not extend to any bilateral business disagreement
21 between two companies regarding proposed licensing terms.
22 These discussions typically pertain to a broader set of
23 questions than just the proposed licensing terms for
24 essential patent claims reading on a standard."

25 And that's the situation that was taking place after those

1 lawsuits were filed. We had business negotiations from
2 November until June and July, in which we were talking about
3 trying to come to a resolution that would encompass
4 everything. And that is not patent hold-up.

5 The fact that we did that, the fact that Motorola did that
6 is proof that we weren't trying to engage in patent hold-up
7 when we sent out the October letters. We were doing what is
8 customary, standard in the industry, and viewed as actually
9 the furthest thing from patent hold-up.

10 The second thing. When we filed those lawsuits in
11 November, that was in response to Microsoft suing us and
12 saying, we know you're going to sue. Put your patents on the
13 table. You've heard evidence that Motorola, with respect to
14 these patents, the WiFi patents, the video compression, you
15 know, didn't actively go out and seek compensation just for
16 those patent portfolios.

17 I think yesterday Mr. Leonard was presented with a few
18 letters from 2003, before our patent portfolio got bigger
19 because we took over another company, in which there might
20 have been attempts to market these portfolios. But basically
21 Motorola had never come to Microsoft, had not gone around and
22 tried to monetize, tried to use these portfolios. What they
23 did was use them defensively in this case. And Microsoft
24 will tell you, as they told the FTC in June of 2011, that
25 when you do that, when you're using your portfolio

1 defensively, that is the farthest thing from patent hold-up.

2 THE COURT: Mr. Price, you've used 60 of 90.

3 MR. PRICE: Thanks. Thank you.

4 Here we go. This is at page 7. Again, this is June 2011.

5 "Depending on the applicable business model, many companies
6 largely use their patents vis-a-vis standards defensively.

7 Far from seeking to 'hold up' implementers, these firms will
8 not seek patent royalties at all in the ordinary course of
9 business. Rather, they will seek a patent license from an
10 implementer only when that implementer has first challenged
11 them on other patent infringement issues." That is defensive
12 use of their patents. And Microsoft recognizes that. And
13 what did they tell you that was thought of in the industry at
14 the time, in June? And that is, that that is far from
15 seeking a patent hold-up.

16 What happened in November wasn't seeking a patent hold-up.
17 What happened in November was we had to try to jump through
18 the hoops to get Microsoft to agree that they owed us
19 anything. To go back to the timeline. Those were the
20 lawsuits on November 10th we filed in the Western District of
21 Illinois. And you see we filed in the ITC on November 22nd.
22 And that was to get an exclusion order. If it was found that
23 Microsoft was infringing our patents, the patents were valid,
24 and Microsoft's defense was, we're entitled to a license
25 under a RAND rate, they can bring that defense up in those

1 lawsuits.

2 That's kind of the customary practice in these lawsuits.
3 Because if you're sued you can say, if I have to pay
4 anything, if you find out that I am infringing, then I can't
5 pay more than RAND. And if I pay more than RAND, I can't get
6 an injunction. Those are defenses permitted in those
7 lawsuits. And, in fact, Microsoft was researching those
8 defenses in those lawsuits. So they're not worried about, as
9 they were -- remember that graph with all those companies?
10 Anyone could come forward and say, we want to prevent you
11 from doing this, we want an outrageous royalty. They're not
12 worried about that because the court wouldn't allow that to
13 happen.

14 But what we need to establish is that they are infringing
15 our patents and the patents are valid. And Microsoft, in all
16 these lawsuits, far from saying, oh, we'll pay whatever RAND
17 rate is determined, said, you don't deserve a penny. You
18 don't deserve a penny because your patents aren't any good
19 and because we don't infringe.

20 There was this gap -- not a gap -- but between November
21 and June/July there were discussions on trying to resolve
22 this. These were the discussions Mr. Gutierrez talked about.
23 Again, this was anticipated by Microsoft. And if we show the
24 timeline. Remember, you heard testimony that there were term
25 sheets that were exchanged, that information was exchanged,

1 that we had high-level meetings, that we had discussions
2 about specific terms, multiple meetings at executive levels,
3 term sheets? All of this took place in good faith, from
4 Motorola, from the time those lawsuits were filed. And they
5 went on and on, until in June or July of 2011 it became clear
6 there was not going to be agreement between the companies.
7 Microsoft was insisting on being paid \$5 a phone, \$10 a
8 tablet, on those Android patents, the ones that it was found
9 that Motorola did not infringe.

10 Mr. Gutierrez testified that prior to the German action he
11 does not know of a single time when Microsoft offered
12 Motorola a RAND rate on Motorola's patents. And so in that
13 context Motorola filed the lawsuit in Germany. And is this
14 part of some plan to try to get excess value from Microsoft?
15 No. Because if you look at the timeline, this is July of
16 2011. This is eight months after the lawsuits were filed in
17 the U.S. This was after there was discussion, after there
18 was negotiation.

19 And the reason that Motorola has to file in Germany, by
20 the way, is that it is a big economy, and no matter what this
21 court says a RAND royalty rate is, if Microsoft isn't
22 admitting that it's infringing the patents and that they're
23 valid, they don't have to pay it. Motorola's only rights
24 against Microsoft are through its patents. They're the only
25 rights they have. And unless Microsoft says, yes, we're

1 using that technology, we're infringing your patents, they
2 don't have to pay us a cent. And they were still
3 maintaining, we aren't required to pay you a cent. So even
4 if a worldwide RAND royalty is set, we have to go to Germany
5 to have them say, on these European patents they are valid,
6 we infringed, and therefore we'll pay. And they hadn't done
7 that. They hadn't come to the table with a RAND rate. They
8 hadn't come to the table saying that, we acknowledge that
9 your patents are good and that we infringed them.

10 And Microsoft will tell you that suing and seeking an
11 injunction at that time was considered, this is a way to get
12 to that RAND rate and to get to that admission that there is,
13 in fact, infringement, and that you've got to pay something.

14 So, in fact, if we go to, again, the June 11, 2011 letter.
15 Again, this is after we sued in the ITC and after we sued
16 here, saying that, Microsoft, you infringed, you owe us
17 money. We have this in front of you. This is at page 13
18 where Microsoft says, "In addition, the existence of a RAND
19 commitment to offer patent licenses should not preclude a
20 patentholder from seeking preliminary injunctive relief or
21 commencing an action in the International Trade Commission,
22 just because the patentholder has made a licensing commitment
23 to offer RAND-based licenses in connection with a standard."
24 So they're saying that their understanding in 2011 is that
25 the existence of a RAND commitment doesn't prevent you from

1 seeking an injunction.

2 Now, whether you'll get the injunction depends upon the
3 law of the jurisdiction. And they go on to say that,
4 "Whether such relief is available should be assessed under
5 the current legal framework in the applicable jurisdiction
6 which often is premised substantially on specific facts and
7 circumstances at issue." And here is the key part, "Any
8 uniform declaration that such relief would not be available
9 if the patentholder has made a commitment to offer a RAND
10 license for its essential-patent claims in connection with a
11 standard, may reduce any incentives that implementers might
12 have to engage in good-faith negotiations with the
13 patentholder."

14 Microsoft acknowledges that you can use an injunction and
15 you may have to use an injunction to get someone like
16 Microsoft, the implementer, to come forward and say, yes, we
17 do infringe. Yes, your patents are valid. Yes, we will pay
18 RAND. We will pay what the court determines. And that
19 hadn't been accomplished as of the time that lawsuit was
20 filed in Germany.

21 And Germany, by the way, wasn't selected because of the
22 distribution center there. You heard Professor Haedicke
23 explain to you that two-thirds of all patent lawsuits in
24 Europe are filed in Germany, because they have specialized
25 courts, because they are efficient. And, yes, because they

1 are cheaper. And you've gotten the idea, because of the
2 damages figures that are used here, that it can be expensive
3 to litigate these cases. So that's where two-thirds of all
4 companies sue for European patents, is in Germany. And
5 that's why we went there. And it's only because we went
6 there that Microsoft finally came forward and said, to this
7 court, okay, we'll be committed -- we will be bound by the
8 RAND rate.

9 Now, in Germany -- by the way, Microsoft did not, again,
10 admit that our patents were any good or that they used our
11 technology. They didn't admit they were standards essential.
12 They fought that. The court had to determine that they
13 infringed, after a trial. That's what they put us through,
14 instead of saying, "We admit we infringe. We admit the
15 patents are valid."

16 Here is the timeline of the lawsuit in Germany. We filed
17 July of 2011, again, because Microsoft has not come to the
18 table, has never given a RAND offer, has never said, we'll
19 pay RAND. Now, if you look at the timeline here, Microsoft
20 says they came into this court and finally said that they
21 were committed to pay RAND. But it wasn't until April 12,
22 2012, April and May. Now, at this point things are getting
23 pretty formalistic between the two companies. We want them
24 to come here and say that they're going to pay RAND.

25 And you remember that May 2nd, 2012 order of the court?

1 It's in that timeframe that Microsoft came before this court
2 and the court said, I'm going to hold you to that promise.
3 I'm holding you, Microsoft, to that promise. And in that
4 context, and only in that context, did this court say, okay,
5 we don't need the German injunction. Because Microsoft was,
6 at that point, being held to a commitment to pay RAND.

7 Now, with respect to what, if anything, was caused by
8 this, whether or not there was any -- whether or not
9 Microsoft moved as a result of this, just look at the
10 timeline. The lawsuit's filed July 6, 2011. You've heard
11 Microsoft's counsel, Ms. McKinley, say, we know injunctions
12 are easily granted in Germany. We know that that's a problem
13 for any company.

14 So, Microsoft waited six months, until January 2012,
15 before it says it considered moving out of Germany. Now, you
16 might ask yourself, why would they wait? And we asked
17 Mr. Roberts that. And he said, I don't know. I don't know
18 what's going on. What we do know is that beginning in August
19 of 2011, right after this was filed, we know that Microsoft
20 was researching whether or not it would come into this court
21 and say, we're committing to RAND now, we're committing that
22 we will pay whatever you determine RAND to be. We want you
23 to stop this.

24 And if you look -- I don't have the blow-up -- but if you
25 look at Exhibit 6577, it's a 230-page exhibit, and page 2318,

1 there is an entry in August of 2011 where Microsoft is doing
2 the research in August of 2011 about whether or not they can
3 move. And then they decide to move. If you look at
4 March 2012, they decide to move. And then, and only then, do
5 they come to this court and say, "Your Honor, you need to
6 stop this because we've actually committed to paying RAND.
7 We don't care what the rate is." They wait eight months for
8 that. They decide to move and then they come here.

9 Remember when I talked to you about staged litigation?
10 This is staged. What happened is that Microsoft concluded
11 it's not a good idea to be in Germany. The German courts
12 easily grant injunctions. Two-thirds of patent suits are
13 filed here. And you heard Ms. McKinley say, that's actually
14 what we told the business people.

15 And let's do Slide 61, Ken.

16 "Question: In advising the client were you -- was it also
17 your responsibility to advise them as to the effect this move
18 would have on the distribution center, you know, in terms of
19 the future business, in terms of future activity?

20 "Answer: So, we knew that injunctions are -- are frequent
21 in Germany. And we -- I would have advised the business on
22 that.

23 "Question: And why would that have had any application to
24 future business?

25 "Answer: Having -- having your global logistics tied up

1 in Germany is -- foreseeably puts you in a situation in other
2 cases.

3 "Question: Why would having your global logistics tied up
4 in Germany -- in Germany, put you at risk or have an effect
5 on future cases?

6 "Answer: I think I've answered that. That's -- again, I
7 -- my understanding is, Germans are -- injunctions are
8 frequent in patent-infringement cases in Germany."

9 So when you go back to this timeline, what you see
10 happening here is Microsoft realizes we shouldn't be here
11 because of the future, because these injunctions are easily
12 granted. And that could affect us if we have a distribution
13 center here.

14 And so they research that in July. They don't go and tell
15 the business unit anything about it for six months. They
16 don't go to this court until after they've already decided to
17 move out of Germany, when they could have gone right away.
18 And that's because they thought, well, this is a good way to
19 get paid for our move. That's a good idea for us to do,
20 anyway. Because, otherwise, they would have gone in right
21 away. And they didn't.

22 And that move to Germany, by the way, did bring benefits.
23 You know there were these calculations about damages? And
24 you heard instructions that we have the duty to prove
25 mitigation. That is, they should have done something

1 cheaper. But what I want to talk to you about now is not
2 mitigation, it is what is the actual damage. When you look
3 at damages, you have to look at benefits also. You have to
4 weigh the pluses and the minuses. So, on the one hand, they
5 moved because of a general threat, not this case, but because
6 their attorneys realized, we shouldn't have our center in
7 Germany. But we can charge Motorola for it.

8 And also there are benefits. You saw the letter from
9 Ms. Daly where she talks about the move as a vision for the
10 future. And she has that graph which has the figures on the
11 German facility, and the new facility, and how it is bigger,
12 and how it is better for what Microsoft needs in the future.

13 And they brought in Mr. Davidson. And you recall,
14 Mr. Davidson was a little bit less than honest about this
15 e-mail. He said, you know, that the e-mail was not correct
16 in terms of the figures. And he said also that he had never
17 discussed the e-mail with Ms. Daly. And, of course, what
18 Ms. Daly told you, if we can play 30.

19 (Ms. Daly's video deposition was played as follows:)

20
21 "Question: When Mr. Roberts reviewed the e-mail and
22 before you sent it, did he have any comments or edits to the
23 e-mail.

24 "Answer: Owen Roberts reviewed it and Jeff Davidson, both
25 reviewed it.

1 "Question: Okay. Thank you.

2 "Answer: Jeff Davidson supplied the facts and figures and
3 the photographs.

4 "Question: I'm sorry?

5 "Answer: Jeff Davidson supplied the facts and figures and
6 the photographs that are attached."

7 (The video deposition testimony concluded.)

8 Q So there were benefits in moving from Germany. And their
9 actions don't support that they moved because of this case.
10 They waited and waited so they could make the case, that's
11 why they moved. But their attorney tells them for future
12 cases as well, you just don't want to be here.

13 Let's step back and look, then, at what Microsoft
14 really thought of all these actions by Motorola. Remember
15 that June 2nd letter to the FTC where they say, this is how
16 we view the world in patent hold-up? Well, there are two
17 paragraphs we read in for you. This is Mr. Heiner. Go to
18 50. Remember there were these two paragraphs where they say,
19 "We suggest that a simplified and theoretical approach to
20 finding patent hold-up may not sufficiently map to complex
21 marketplace realities." And they go on to say, "It may pull
22 in what are essentially routine business negotiations between
23 two parties." It talks about how they consider broad
24 licensing terms, not just royalty elements. That's what
25 happened here.

1 They go on to say that these types of negotiations
2 shouldn't be labeled as patent hold-up. They go on to say
3 there's an important difference between intentional or
4 deceptive conduct in connection with patents that read on
5 standards, and routine bilateral disagreements over licensing
6 terms.

7 And then what do they say? Now, this is after we've
8 sued in the ITC and after we've sued saying, you infringed
9 our patents, you should pay us. They go on to say in the
10 very next paragraph: In the former context -- and that's
11 intentional and deceptive conduct. And Microsoft is accusing
12 Motorola of intentional conduct -- there seems to be a dearth
13 of examples of actual patent hold-up with regard to the
14 essential patent claims reading on a standard. Microsoft has
15 never been accused of patent hold-up in this regard, nor has
16 it accused any other company of such behavior. This is not
17 to say that Microsoft has never been a party to litigation
18 where the parties disagree whether proffered licensing terms
19 were consistent with the relevant patent licensing
20 commitment, such as RAND. And when they have those
21 disagreements it may make sense for them to seek resolution
22 in the courts.

23 But their view as of that time, after we filed our
24 lawsuits in the ITC, and after the lawsuit here, was that's
25 not patent hold-up. It ended up in a disagreement, and we

1 had bilateral negotiations. And the explanation Mr. Heiner
2 gave you is simply, oh, I didn't mean for this to include
3 that. "Intentional" only included hiding a patent. And
4 there is nothing anywhere in this letter that defines patent
5 hold-up as hiding a patent.

6 THE COURT: Mr. Price, you're a little under ten
7 minutes.

8 MR. PRICE: Thank you.

9 That's how Microsoft saw the world. And in connection
10 with staging. Staging for you as opposed to staging
11 litigation as to what the real world is like, I want you to
12 consider two things. One, the evidence about the FTC. You
13 heard that there is an FTC "complaint." Well, I think the
14 court instructed you that that doesn't mean the same thing as
15 a complaint like here in a lawsuit. It is basically, we are
16 starting an investigation into an allegation. It's an
17 allegation which the court told you you cannot accept for the
18 truth, because it is simply an investigation. Microsoft
19 wants you to think that the allegations are, in fact, true.

20 Now, if you look at the timing of that FTC investigation,
21 what do we have? And this is Slide 33. What we have is it
22 was because Microsoft called -- I was going to say I'm
23 dyslexic, but that would still be 33 -- but what Mr. Heiner
24 testified to is that Microsoft called the FTC and said, "We
25 have a complaint that we want you to look into." And what

1 was the timing of this? Why was Microsoft doing that? Is it
2 because of all this stuff that Motorola had been doing? No.
3 It's because, if you look at the timing -- and I'll cross my
4 fingers, let's try 34 -- yes. Okay? Is it fair to say that
5 Microsoft was doing quite a bit of lobbying? And they have a
6 government affairs office. And those agencies include the
7 FTC.

8 And the second one, which I know must not be 34, the
9 second one was, the timing of this was, it was when Google,
10 Microsoft's, one of their big competitors, it's when Google's
11 acquisition of Motorola was about to close. And this is in
12 May of 2012. Where was Microsoft? Why weren't they
13 complaining before that? Why weren't they complaining
14 throughout this? This is, again, staged. It's a staged
15 presentation to try to get you to think there is something
16 wrong going on here. They go to the FTC and complain. The
17 FTC investigates. And the reason they go is because, well,
18 Google is about to acquire Motorola. And Google is their
19 chief competitor.

20 The second bit of wonderful staging is the Marvell
21 situation. Now, if you remember the timeline -- if we can go
22 to timeline, 35 -- this is a timeline concerning Marvell.
23 And in November 2004 Microsoft started buying chips from
24 Marvell. Motorola never requested that Marvell take a
25 license. And then on November 24, 2010 -- this is

1 November 24th, this is after Microsoft has filed its
2 complaint, November 9th, and Motorola filed its complaint.
3 It's the same month. They demand for the first time that
4 Marvell obtain a RAND license. What they say to them in that
5 demand on November 24, 2010 is, you have to indemnify us if
6 we lose. That is, all these horrors that Microsoft has
7 talked to you about that was visited upon them because of
8 Motorola's lawsuits, Microsoft goes to Marvell and says,
9 you're going to have to reimburse us for everything,
10 indemnify, unless you go out and get a license from Motorola.

11 And so with that gun to their head, Marvell finally asked
12 Motorola for a RAND license. And the reason they asked, Ms.
13 Ochs testified, the only reason they asked was because
14 Microsoft said, if you don't do that, you're going to have to
15 indemnify us and pay us any damages that we have to pay to
16 Motorola because we're infringing their patents.

17 But what happened, what this inadvertently showed, was
18 what the industry expects and what Motorola expected from the
19 beginning, which is that there would be negotiations. What
20 happened is Motorola said, we'll meet with you. Marvell
21 responds June 26, 2012 saying, here's a counteroffer with a
22 zero-zero, basically, result. And they said, we have
23 patents. Marvell said, we have standards-essential patents,
24 so let's compare them. And we say, okay, that's fine. Send
25 us the claim charts. Again, that's standard practice. And

1 Marvell says, we'll send you those. We're working on them.
2 We'll get it to you right away. And that was June 26, 2012,
3 and we haven't gotten them yet. And the reason we haven't
4 gotten them yet is just because this, again, is just
5 stage-crafting. This is just Microsoft trying to present, in
6 this case here, a suggestion that there was something wrong
7 here, by creating the situation with Marvell.

8 And remember during the trial they also said, oh, and it
9 was terrible that in our licensing negotiations we had this
10 defensive suspension provision which said, "Marvell, we'll
11 give you a license, but it won't apply to Apple and Gemalto
12 and Microsoft." And Microsoft said, oh, there's something
13 wrong with that. That's a violation of FRAND.

14 And Ms. Ochs, when she testified during deposition --
15 Mr. Palumbo did the examination here, playing himself --
16 said, this is 537, said, "Typically, in the context of
17 entering into a standards body with other competitors, or
18 even in agreements like this, there is a provision whereby if
19 the other party initiates an action against you, you may
20 suspend or somehow modify the RAND obligation."

21 She is talking about this defensive suspension issue that
22 if you're sued and then someone asks you for a license, you
23 know, that you could arguably say the person who sued you
24 doesn't have any obligation to you, you can say, well, it
25 won't apply to them. When you look at that June 11, 2011

1 letter that Microsoft sent to the FTC, they discuss this
2 practice and say, this is part of standard business
3 negotiations. And that's at page -- here we go, page 52,
4 Slide 52, page 6. And Microsoft talks about oversimplifying
5 this analysis of standards-essential patents.

6 And if you look at the last bullet point down there,
7 actually, it's a sub-bullet point. "Companies who are
8 willing to offer their essential patents free of charge,"
9 which is what we were doing with Marvell, "they include a
10 defensive suspension clause that causes that free license to
11 terminate if the licensee commences litigation against the
12 licensor without any grounds whatsoever."

13 And on the next page, the following page, you saw the
14 paragraph where Microsoft says, you know, the problem is that
15 this theoretical approach to patent hold-up -- and you've
16 heard the theoretical approach from Professor Murphy --
17 doesn't sufficiently map the complex marketplace realities
18 and pulls in what are essentially routine business
19 negotiations between the two parties.

20 THE COURT: Hard stop at a minute and a half,
21 counsel.

22 MR. PRICE: Thank you. Ladies and gentlemen, in
23 response to Microsoft's lawsuit, Motorola did what was
24 standard and custom, the customary practice in the industry.
25 They responded. They thought there would be further

1 negotiations. And there was, by the way. When you look at
2 damages, one of the instructions that you get, did anything
3 that Motorola did wrong cause harm? It didn't. Because
4 those negotiations continued. The problem is that
5 Mr. Gutierrez testified Motorola never came up to a RAND,
6 even offer, until we finally had to go to Germany. And then
7 Microsoft said, we don't infringe your patents. And finally,
8 because the threat of injunction, they came here and said,
9 "We will commit to paying a RAND rate. We will commit."
10 And, of course, that determination was made by the judge.

11 This lawsuit is simply trying to apply more pressure to
12 Motorola, now owned by Google, trying to get an advantage in
13 this bigger picture, in this bigger fight about what kind of
14 software is going to be on your phone.

15 So I request, obviously, that you -- and I'm glad that
16 you've actually listened to the evidence carefully. I know
17 you're going to go back there and talk about the evidence and
18 talk about the dynamics of the negotiations --

19 THE COURT: You're out of time.

20 MR. PRICE: -- and do the right thing.

21 THE COURT: Thank you.

22 Mr. Harrigan, you have 21 minutes, excuse me, 23 minutes.

23 MR. HARRIGAN: Thank you, Your Honor. Hopefully my
24 battery will last that long.

25 I will do this in no particular order. I've been typing

1 as fast as I can. One of the arguments that you just heard
2 is that Microsoft's complaint in this Microsoft lawsuit, in
3 this court, would not solve the problem. Well, that's
4 incorrect. It would have solved the problem if Motorola had
5 simply used the opportunity. If it had not, instead, sought
6 injunctive relief that it didn't need in order to get a RAND
7 royalty.

8 Microsoft asked for an accounting in the complaint. That
9 means it asked the court to tell both parties how much
10 Microsoft owed once the court decided what RAND was. So for
11 that reason alone, Motorola could have gotten a RAND royalty
12 and Microsoft would have gotten a license, and none of these
13 other lawsuits would have been necessary.

14 However, it's been suggested that that wasn't enough, that
15 Microsoft needed to say, we will take a license on whatever
16 terms this court decides are RAND. And Microsoft did that
17 very thing on September 30, 2011. Now, counsel has been
18 using a much later document that refers back to that
19 statement by Microsoft. But that document in 2013 is not
20 when Microsoft made this commitment. Would you put up Slide
21 No. 1?

22 Okay. So Mr. Killough testified that -- if you look at
23 the top. "In its brief that Microsoft filed in this lawsuit
24 on September 30, 2011, did Microsoft tell the court anything
25 regarding a RAND license?" And he quotes from it down below:

1 "Microsoft is seeking and remains ready and willing to take a
2 license to Motorola's H.264 and 802.11 declared essential
3 patents on RAND terms." That statement was made to this
4 court. And from that date forward no one could argue,
5 remotely argue, that Motorola couldn't get RAND and that
6 Microsoft couldn't get a RAND license right here in this
7 court. All Motorola ever had to do after September 30, 2011,
8 is wait for this court to decide and submit its arguments
9 about what the rate should be.

10 Sixteen months later Motorola was still seeking injunctive
11 relief. Injunctive relief that its own expert, Mr. Leonard,
12 says is unnecessary. Money is all they're entitled to. And
13 they could have gotten it all right here. And that situation
14 existed during the 16 months that they were still trying to
15 get injunctions in the ITC and in Germany.

16 In fact, there's no reason to file an action in the ITC if
17 what you want is a reasonable royalty. The ITC doesn't award
18 royalties. The only thing the ITC can do is give injunctive
19 relief. That's what Motorola was interested in, because it
20 wanted to hold its standards-essential patents hostage so it
21 could get leverage in the other negotiations that were going
22 on. And that is bad faith and it is a breach of the RAND
23 commitment.

24 Now, you also might want to ask the question, why did
25 Motorola go to Germany? And it's been suggested to you that

1 Microsoft -- that Motorola couldn't have gotten an injunction
2 unless some court determined that Microsoft wouldn't take a
3 license on RAND terms. That is absolutely incorrect. You
4 recall Mr. Haedicke, the German law expert, he was asked this
5 question:

6 "Do German courts recognize the concept of RAND?

7 "Answer: No, they don't."

8 Germany -- basically the German courts basically say, do
9 you have a license? And if the answer is no, you get
10 enjoined.

11 And they do not determine whether Motorola had honored its
12 RAND commitment, as this court did -- I should say this court
13 determined what RAND really was. That would have been the
14 basis for the license. And there was no need for Motorola to
15 be going to a jurisdiction that doesn't recognize RAND in
16 order to get injunctive relief, which was unnecessary if it
17 simply wanted a RAND royalty.

18 And, of course, the other benefit of going to Germany was
19 the amount of leverage that it got. Because the German
20 distribution center was sending products to a large portion
21 of the globe, and it gave Motorola a real hammer in getting
22 Microsoft to cave in on the negotiations with respect to the
23 rest of the patent portfolio.

24 The other thing that's important here is that starting --
25 that Motorola was still seeking injunctive relief in the ITC

1 until January of 2013. And yet, beginning in May of 2012, it
2 knew that the FTC believed that its conduct amounted to
3 reneging on its RAND commitment.

4 MR. PRICE: Your Honor, I object. That's a misuse of
5 the FTC documents.

6 THE COURT: I'll sustain that. Ladies and gentlemen,
7 disregard the last portion of the argument.

8 MR. HARRIGAN: What happened here is that the FTC
9 expressed grave concern about Motorola's conduct and a
10 consent decree was entered in January of 2013 between
11 Motorola and the FTC. And in January 2013 Motorola dropped
12 its exclusion order claims in the ITC. So those are the
13 facts in evidence. And the point is that Motorola,
14 regardless of the concerns being expressed by the FTC over
15 the period from May of 2012 until January of 2013, did not
16 alter its course of action. And with respect to the German
17 situation, it was still hoping that it could get an
18 injunction as late as the end of September of 2012, when the
19 Ninth Circuit finally ruled and upheld this court's ruling
20 that Motorola was barred from enforcing an injunction in
21 Germany.

22 There was some discussion about the Marvell situation.
23 And Motorola argued that something called defensive
24 suspension justified its excluding Microsoft from its Marvell
25 license offer. But the fact is that defensive suspension

1 only applies where the lawsuit that's filed by the other side
2 is on the same standard. And Microsoft never filed any such
3 lawsuit. Defensive suspension has nothing to do with this.
4 What Motorola did, vis-a-vis Marvell, was to demand a royalty
5 that was more than the price of the chip. And even at that,
6 it excluded Microsoft from the licensees, and that is
7 discriminatory. And you'll recall that the last two letters
8 of RAND are non-discriminatory. You cannot discriminate
9 without violating RAND.

10 Have you heard a sensible explanation of the grossly
11 excessive royalty demands in the October letters? Well, one
12 of them is, that's our usual 2.25 percent. But we know that
13 that royalty -- the precedent for that royalty is limited to
14 Motorola's cellular phone patents. Motorola's cellular phone
15 patents are what makes cell phones, cell phones. They are
16 central to the product.

17 There is no evidence that Motorola had ever gotten
18 anything like 2.25 percent for its H.264 or 802.11 patents.
19 In fact, it had never even tried to license them alone, which
20 is remarkable, since according to Motorola they're worth
21 \$4 billion a year, which is the royalty that the demands
22 actually called for.

23 Motorola also knew that the MPEG LA rates were a tiny
24 fraction of what it was seeking for H.264. That's the patent
25 pool. Their rates were lower than \$0.10 a unit. And

1 Motorola's demands in its letters were \$11.25 for H.264 in a
2 \$500 laptop. That information Motorola had when it wrote the
3 letters. And it means that Motorola absolutely knew that
4 what it was demanding in those letters was outrageous.

5 In fact, Mr. Bawel, Motorola's representative at MPEG LA,
6 had complained about a royalty of \$0.20 and argued that it
7 was, "Too high for mobile," as Mr. Glanz testified. And yet,
8 \$11.25, apparently, isn't.

9 The other thing that is significant here -- and I'd like
10 Slide No. 4 -- Motorola had never before applied a percentage
11 royalty to the customers of the licensee. And here is the
12 testimony.

13 "Question: And so is it fair to say that you were asking
14 Microsoft to do something that no other Motorola licensee was
15 doing. Isn't that true?

16 "Answer: That's right. Because we expected to deal with
17 that in negotiations."

18 In other words, you heard the argument that Mr. Dailey
19 just dashed these letters off because he was short on time.
20 But, in fact, he had time to carefully design both of these
21 letters so that -- particularly the H.264 letter -- so the
22 2.25 percent, for the first time in Motorola's history,
23 applied not to the product of Microsoft, but to the product
24 of Microsoft's customer.

25 And the effect of that is enormous. Because if it had

1 been 2.25 percent of whatever Microsoft gets for the
2 operating system, it would still be outrageous, but at least
3 it would be sensible, even though grossly too high. But when
4 you apply it to Microsoft's customers' products, where the
5 operating system is exactly the same and does exactly the
6 same thing in every laptop, and the royalty goes from \$11.25
7 for a \$500 laptop and \$22.50 for a \$1,000 laptop, you can
8 tell that Motorola was setting out to demand something that
9 no company in its right mind would regard as anything other
10 than a joke.

11 It wanted to send a letter, say it had made an offer, have
12 the offer expire, go to court and seek injunctive relief. It
13 had no interest in negotiating on these patents. It had an
14 interest in negotiating on all the other patents and holding
15 these hostage so it could get an advantage in that
16 negotiation. That is what was going on. That is why those
17 letters -- the demands in those letters were outrageous.
18 They were designed to be totally unacceptable so you could go
19 to Germany and say, "They don't have a license." Well,
20 obviously they don't have a license. They have never gotten
21 a RAND offer. And that is Motorola's obligation. Its
22 obligation is to make its standards-essential patents
23 available to everyone on RAND terms.

24 So, you recall the discussion about how Mr. Gutierrez
25 said, well, yeah, we'd expect them to put all their patents

1 on the table for whatever value they have. And did that
2 include standards-essential patents? Well, sure. But the
3 point is, the standards-essential patents have nominal value.
4 Remember the IEEE requirement for the royalty. Nominal
5 competitive costs. The royalty for a standards-essential
6 patent has to be reasonable. And if all you're being -- so
7 the only -- if you're not going to violate RAND, the only
8 amount you can put on the table for a standards-essential
9 patent is something that nobody will have a problem paying.
10 That's how the system is supposed to work.

11 Standards-essential patents are supposed to be no problem to
12 put in your products because you always know you'll be able
13 to use them and pay only a reasonable amount.

14 So, when Mr. Gutierrez has this conversation, of course
15 there's no problem putting standards-essential patents into
16 the mix, we're not going to have to pay much for them. So
17 the patents that they really were negotiating about were
18 their regular patent portfolios. And the reason Motorola
19 held the standards-essential patents back was because they're
20 such a good weapon. And they're such a good weapon because
21 you can't practice the standard without using all of them,
22 even Motorola's sliver.

23 So it's taking the sliver. It's violating RAND by
24 demanding far more than a reasonable royalty, going to court
25 and saying, no license, and threatening Microsoft with

1 injunctive relief. That was the goal.

2 THE COURT: Nine minutes, counsel.

3 MR. HARRIGAN: How many?

4 THE COURT: Nine.

5 MR. HARRIGAN: Thank you.

6 Then there's this entire discussion about the Android
7 phone patents. Let's compare these two situations.

8 Microsoft is asserting a garden-variety regular patent, not a
9 standards-essential patent, because Motorola was, in fact,
10 infringing one of those patents, at least in its Android
11 phone products. In fact, the ITC found that Motorola was
12 using one of those patents and that, therefore, it was --
13 Motorola was infringing Microsoft's patent.

14 But have you heard anything in this case that suggests
15 that what Microsoft was asking Motorola to pay for those
16 Android phone patents was unreasonable? Not a word. And, of
17 course, if there were any evidence that Microsoft was asking
18 for an unreasonable amount, you would have seen it.

19 Microsoft had no RAND obligation with respect to those
20 Android patents. Motorola did with respect to its patents.

21 But the fact is that according to the evidence here,
22 Motorola could have solved that problem by simply recognizing
23 it was infringing and paying the reasonable amount that
24 Microsoft was asking for. And what we know about what
25 Microsoft was asking for is that 80 percent of the companies

1 selling Android phones are in license agreements with
2 Microsoft and are paying royalties. They're not being
3 overcharged. In fact, Mr. Gutierrez said, essentially the
4 only outlier is Motorola. It still has not taken a license.
5 But it could get one for an amount that a whole bunch of
6 other companies are seeing as totally reasonable. By
7 contrast, Motorola's patents were available only on grossly
8 unreasonable terms.

9 And I'd like to remind you of one other thing, and that is
10 one of the things the court says that you should do or may do
11 in determining whether Motorola's demands, followed by
12 injunctive relief based on lack of a license, is to compare
13 Motorola's demands to the RAND royalty as determined by the
14 court. That is in the instructions. "In determining bad
15 faith, you may compare Motorola's demands for a RAND royalty
16 as determined by the court" -- excuse me -- "may compare
17 Motorola's demands to the RAND royalty as determined by the
18 court."

19 In fact, it is now undisputed -- take H.264. The RAND
20 royalty as determined by the court was one half-a-cent.
21 Motorola's demands for a \$500 laptop were \$11.25. So the
22 court is saying you can make that comparison in evaluating
23 whether Motorola was acting in good faith. And that is
24 probably the single most unequivocal piece of evidence they
25 were not acting in good faith. There was a lot of other

1 important evidence, like what they actually knew about what
2 their patents were worth. But when you make that comparison,
3 it's hard to believe that a company as sophisticated as
4 Motorola could accidentally miss RAND by two thousand times.
5 That's what it would have you believe happened with those
6 letters.

7 So I want to mention something about the verdict form,
8 which you will have to fill out at some point, whenever
9 you're ready to do that. The verdict form says this with
10 regard to -- it poses this question, before you award a
11 specific dollar amount for Microsoft's legal fees. It says,
12 "Do you find that Motorola's conduct in seeking injunctive
13 relief, apart from Motorola's general course of conduct,
14 violated Motorola's duty of good faith and fair dealing with
15 respect to Motorola's contractual commitment?"

16 So I would just like to focus on the words "apart from
17 Motorola's general course of conduct," in that statement.
18 This question asks you to focus on Motorola's pursuit of
19 injunctive relief, because you can only award legal costs to
20 Microsoft for that part of Motorola's breach. In other
21 words, what the court is saying is, exclude the general
22 course of conduct, but if Motorola's conduct in seeking
23 injunctive relief violated its duty of good faith, then you
24 should award the legal fees that Mr. Killough segregated out
25 that are related -- which is all of the legal fees that he

1 segregated out, are related to the pursuit of injunctive
2 relief.

3 THE COURT: Three minutes, counsel.

4 MR. HARRIGAN: Three. Thank you.

5 Mr. Pritikin just gave me a little guidance -- which he
6 frequently does -- that the Android phone case is not
7 remotely a defense to the claim that Microsoft is making
8 against Motorola based upon the breach of the RAND
9 commitment. The fact that Motorola and Microsoft had some
10 other argument and that Motorola was upset about it, or
11 thought that Microsoft was doing something unfair, or was
12 launching a surprise attack, none of those things have any
13 effect on Motorola's RAND obligation.

14 The whole point of the RAND obligation is, no matter what
15 happens, you have to make your standards-essential patents
16 available to everyone -- everyone includes somebody you're
17 mad at -- on reasonable and non-discriminatory terms. And
18 that is what Motorola did not do. And the reason it did not
19 do it is it wanted to hold them hostage, so it could go to
20 Germany and say, Your Honor, they don't have a license -- or
21 whatever they call judges over there -- they don't have a
22 license, and therefore they should be enjoined. And that put
23 enormous pressure on Microsoft, until this court stopped them
24 in their tracks in April of 2012, and until Microsoft, in its
25 other way of dealing with it, spent \$23 million moving its

1 distribution facility into the Netherlands.

2 Thank you very much.

3 THE COURT: Thank you, counsel. Well, ladies and
4 gentlemen, at this point you have become the most important
5 people here -- not that you haven't been all the way along --
6 because the case now belongs to you. I have been handed a
7 note by the clerk that says, "Would you please go through
8 your schedule for tomorrow?" So I will start with today.
9 Your lunch is back there. You can deliberate until around
10 4:20, and then I will bring you out and read you your
11 good-night message. Or if you want to go until 5 o'clock,
12 I'll bring you out at 4:50 and then read the same thing. But
13 that's today.

14 Tomorrow morning, we don't ask you to come out into the
15 courtroom before you start. You just can't start
16 deliberating until everybody gets there. So if you want to
17 come at 8:30, or if you want to come at 9 o'clock, work that
18 out among yourselves. We, once again, will bring in your
19 lunch. It's very important that we keep you well fed.

20 The court has no control, and wouldn't want any control,
21 over how long it takes you to deliberate on this case.
22 You're free to deliberate until 4:30 tomorrow, if it takes
23 you that long. I'm not trying to suggest one way or the
24 other.

25 I'm going to leave at 1:30, because I need to go to

1 Sea-Tac and get on a 3 o'clock airplane. My concerns are
2 that if you have questions, I consult with the lawyers before
3 I answer the question, and if I'm on an airplane, I can't
4 consult. So there's going to be some delay in that.

5 And if you do reach a verdict, I could have the option of
6 asking another judge to take it. But my preference would be
7 to have the opportunity to have you hand it to the clerk, the
8 clerk hands it to me, I read it and make sure it's internally
9 consistent, then we announce it to the parties. I'm a little
10 concerned, given the complexity of this case, that if there
11 is an issue, that someone sitting up here and trying to be
12 the judge is going to go, "What was this case even about?"
13 So that's why I'm concerned about Friday. We may reach it,
14 we may not. That's entirely up to you. So hopefully that is
15 some additional guidance.

16 I understand that people have commitments, and I'm going
17 to discuss that with the lawyers here in a moment. But
18 that's the best guidance I can give you on that question.
19 Other than that, ladies and gentlemen, I'm sure you would all
20 like to stand up and stretch your legs. So you can do that
21 by retiring to the jury room. You'll get the exhibits, and
22 your lunch is already there. And we will all be awaiting,
23 with interest, your result.

24 (The following occurred outside the presence of the jury.)

25 THE COURT: Counsel, Juror No. 4 has airplane tickets

1 on Friday. She's indicated that she will change her flight.
2 It seems to me there is nothing that we should do in that
3 regard until sometime tomorrow. If she announces that she
4 doesn't want to change her flight and she wants to go, I'm
5 going to need some guidance from the parties on whether I
6 release the juror or not. So you might start to think about
7 that question. You have a six-person jury, we have two
8 additional, so we can lose one without any consequence. But
9 I want you to know it is Juror No. 4. And that's what the
10 concern is. This is not her grandmother dying, unless her
11 grandmother lives in Orlando. That's what I know and now you
12 do, also.

13 Mr. Harrigan, anything further at this time?

14 MR. HARRIGAN: Nothing, unless Mr. Pritikin thinks
15 there is.

16 MR. PRITIKIN: No, sir.

17 THE COURT: All right. Mr. Price?

18 MR. PRICE: No.

19 THE COURT: Counsel, my rule is if I can deal with a
20 question by simply calling you, I will do so. So you need to
21 leave your cell numbers and you need to make sure that you
22 have some space in your box, so if we have to leave you a
23 message, we can do that. I know how those messages
24 accumulate while you're in trial.

25 If I don't think we can do it over the phone because it

1 requires a more in-depth discussion, I'm going to ask you to
2 come back. I'd ask you to be accessible to the courthouse
3 within ten minutes or so, so we can handle those matters.
4 Counsel, thank you.

5 And if I don't hear anything from them, which is possible,
6 I will either bring them out at around 4:20 or 4:50,
7 depending on if they want to work a little bit longer, and
8 read them the standard, "Don't talk to anyone" instruction
9 and then send them home.

10 It's up to you whether you want to attend or not attend
11 that. All I would ask is that if you do attend, don't all
12 line up in the hallway to watch them come in and out of the
13 elevator. Other than that, we will be in recess. Thank you,
14 counsel.

15 (The clerk brought out a note from a juror.)

16 THE COURT: Don't go away. The question is, "If we
17 decide Thursday afternoon, can one or two of us not be here
18 on Friday morning?" I believe the answer to that is no, if
19 anyone wants to poll the jury. Mr. Harrigan? Mr. Pritikin.

20 MR. PRITIKIN: Unfortunately, Your Honor, I think
21 they would all have to be here if the verdict is going to be
22 returned on Friday morning.

23 THE COURT: Mr. Price, you agree?

24 MR. PRICE: I agree.

25 THE COURT: So do I. And the other thing will be if

1 she wants to seek to be excluded from the jury, that's one
2 way out of that problem. Thank you.

3 (The proceedings recessed.)

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1 C E R T I F I C A T E
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34 We, Barry Fanning and Debbie Zurn, Official Court
5 Reporters for the United States District Court, Western
6 District of Washington, certify that the foregoing is a true
7 and correct transcript from the record of proceedings in the
8 above-entitled matter.9
10
11 DATED this ^ day of August, 2013.
12
1314 /s/ Barry Fanning /s/ Debbie Zurn
15 Barry Fanning, Court Reporter Debbie Zurn, Court Reporter
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